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No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

MICHAEL C. LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in spite of this Court's rulings in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995), and *Milliken* v. *Bradley*, 418 U.S. 717 (1974), the Eighth Circuit correctly ruled in this 25-year-old case that a federal court may compel a State to bear the costs (here, more than $100 million per year) of an interdistrict desegregation remedy without a finding that the State committed an interdistrict constitutional violation that had a racially segregative effect across district lines.

PARTIES

In addition to the State of Missouri, the following officers or instrumentalities of the State are petitioners in this Court: Governor Mel Carnahan; Attorney General Jeremiah W. (Jay) Nixon; Treasurer Bob Holden; Commissioner of Administration Richard A. Hanson; Commissioner of Education Robert E. Bartman; the Missouri State Board of Education, and its Members: Sharon M. Williams, President, Betty Preston, Vice President, Thomas R. Davis, Peter F. Herschend, Jacqueline D. Wellington, William Kahn, Russell V. Thompson, and Rice Pete Burns, Jr.

The following persons or entities, who appeared as plaintiffs-appellees in the court below, are named as respondents in this Court: Michael C. Liddell; Kendra Liddell; Minnie Liddell; Roderick D. LeGrand; Lois LeGrand; Clodis Yarber; Samuel Yarber; Earline Caldwell; Lillie Caldwell; Gwendolyn Daniels; the City of St. Louis, Missouri; the National Association for the Advancement of Colored People; and the United States of America.

The following persons or entities, who appeared as defendants-appellees in the court below, are named as respondents in this Court pursuant to this Court's Rule 12.6: The Board of Education of the City of St. Louis, and its Members: Hattie R. Jackson, President, Renni B. Shuter, Paula V. Smith, Dr. Albert D. Bender, Sr., Marybeth McBryan, Thomas M. Nolan, William Purdy, Robbyn G. Wahby, and Madye Henson Whithead; Superintendent of Schools for the City of St. Louis Dr. Cleveland Hammonds, Jr.; St. Louis Collector of Revenue Ronald Leggett; Special School District of St. Louis County; Affton Board of Education; Bayless Board of Education; Brentwood Board of Education; Clayton Board of Education; Ferguson-Florissant Board of Education; Hancock Place Board of Education; Hazelwood Board of Education; Jennings Board of Education; Kirkwood Board of Education; Ladue Board of Education; Lindbergh Board

of Education; Maplewood-Richmond Heights Board of Education; Mehlville Board of Education; Normandy Board of Education; Parkway Board of Education; Pattonville Board of Education; Ritenour Board of Education; Riverview Gardens Board of Education; Rockwood Board of Education; University City Board of Education; Valley Park Board of Education; Webster Groves Board of Education; Wellston Board of Education; St. Louis County; St. Louis County Executive Buzz Westfall; St. Louis County Director of Administration James Baker; Collector of St. Louis County "Contract Account" Robert H. Peterson; St. Louis Career Education District; and St. Louis Teachers Union, Local 420, AFT, AFL-CIO.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari be issued to review the ruling of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 126 F.3d 1049 and is reproduced in the Appendix to this Petition for Certiorari ("Pet. App."), beginning at page 1a. The unpublished order of the United States District Court for the Eastern District of Missouri, denying the State of Missouri's motion to terminate its obligation under the court-ordered busing plan to fund new entrants into the St. Louis interdistrict student transfer program, was entered on April 10, 1997, and appears at Pet. App. 23a.

JURISDICTIONAL STATEMENT

The court of appeals entered its opinion and judgment on September 25, 1997. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

It has been the law since at least *Milliken* v. *Bradley*, 418 U.S. 717 (1974) ("*Milliken I*"), that, like all other constitutional remedies, "the scope of the [desegregation] remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744. An important corollary to this fundamental rule of constitutional law is that

in a school desegregation case, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745. This Court strongly reaffirmed this principle three Terms ago in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995) ("*Jenkins III*"), holding that a federal court exceeds the bounds of its remedial authority under the Constitution where, as here, it imposes an *inter*district remedy in a school desegregation case involving only a finding of an *intra*district violation—a principle that even the dissent in *Jenkins III* characterized as "a rule of law that can claim both precedential support and intuitive sense." *Id.* at 158 (Souter, J., dissenting).

Instead of phasing out the State's $2 million per week interdistrict funding obligations, as plainly required by this Court's precedents, however, the Eighth Circuit held that the Court did not mean what it plainly said in *Jenkins III*. As the court of appeals would have it, an interdistrict remedy *may* be imposed on a State based upon a mere finding of an intradistrict violation, notwithstanding *Jenkins III*, as long as there has been no finding that there was *not* an interdistrict violation. This extraordinary holding is so manifestly inconsistent with two decades of decisions from this Court culminating in *Jenkins III* that it warrants summary reversal. At a minimum, the decision conflicts with a host of court of appeals decisions properly applying the rule of *Milliken I*, and the Court should therefore grant the petition to clarify the relationship between the holdings in *Jenkins III* and *Milliken I*.

BACKGROUND

This school desegregation case has been litigated in the federal courts for almost three decades. In all that time, the *only* finding of liability made by the courts below was intradistrict in nature—that is, a finding limited in scope to the St. Louis Public School District ("SLPS"). See, *e.g.*, *Liddell* v. *Missouri*, 731 F.2d 1294, 1302 (8th Cir.) (*en banc*) ("*Liddell VII*"), *cert. denied*, 469 U.S. 816 (1984). For the last 16 years, plaintiffs and their school

district allies have pursued, at the State's expense, the most expensive school desegregation remedy in the Nation's history. Under the resulting so-called "Voluntary Interdistrict Transfer Program" ("VIDT") agreed to by the plaintiffs, SLPS and numerous neighboring suburban school districts (all respondents here), but *not* the State of Missouri or any State agency, the State has been compelled, over its repeated objection, to fund interdistrict transfers of students between those districts since 1983.

The court-ordered interdistrict remedies in this case have cost the State of Missouri approximately $1.6 billion —funds that have flowed directly out of the State's budget and into SLPS and its VIDT partners. Pet. App. 27a. These funds include over $283 million for VIDT transportation, $595 million for tuition reimbursement (paid largely to suburban school districts), $36 million for capital payments to suburban districts to build new educational facilities to accommodate transfer students from SLPS, $107 million for capital within SLPS, $158 million for magnet school operating costs, and $531 million for educational programs in SLPS. *Id.* at 25a. Each week that the State is required to fund the interdistrict programs costs Missouri taxpayers approximately $2 million, for a total annual interdistrict remedy cost in excess of $100 million (*id.*) and a total annual remedial cost of approximately $150 million. *Id.* at 27a. As a result of these court-ordered expenditures, the current per-pupil cost of public education in St. Louis is approximately $8,100, which is substantially higher than the $4,500 average cost for the rest of the State. State Exh. 18a. To put Missouri's statewide desegregation funding obligations in perspective, the State's monetary contribution to desegregation efforts have been nearly as much as all other States combined, excepting only California. State Exh. 57, Testimony of Dr. Christine Rossell, Tr. vol. 1-A, at 54 (Mar. 5, 1996).

Procedural Background

1. *The Liability Phase.* On February 18, 1972, this suit was filed on behalf of Craton Liddell, then a minor

(and now an adult), his mother, and other children from St. Louis and their parents against the Board of Education of the City of St. Louis ("City Board"). The complaint alleged that the City Board had "effected and perpetuated" unconstitutional racial segregation in the operation of pubic schools within SLPS. On October 3, 1973, a class was certified on behalf of all school-age children and their parents residing in the metropolitan school district of the City of St. Louis. After the submission of various alternative plans for the desegregation of St. Louis public schools, the district court announced, on July 13, 1977, that it would be necessary to determine whether there had been any constitutional violation within SLPS. At that point, the City of St. Louis and the United States, among others, intervened as plaintiffs in the litigation, and petitioners were joined as defendants.

Following a lengthy trial that produced over 7,000 pages of transcript and approximately 1,200 exhibits, the court ruled that defendants had not committed any constitutional violation. 469 F. Supp. 1304 (E.D. Mo. 1979). The Eighth Circuit reversed. *Adams* v. *United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980). Based on its own review of the evidence, the appellate court found that demographic and other "factors cited by the [district] court, including actions of the state and federal governments, have intensified racial segregation in North St. Louis." *Id.* at 1291. The court accordingly remanded the case for development and implementation of a "system-wide remedy" to eliminate "[s]egregation in the elementary and secondary schools in St. Louis." *Id.*

2. *The Remedial Phase.* On remand, the district court conducted extensive evidentiary hearings concerning the mandated "system-wide remedy." The plan ultimately adopted by the district court sought to achieve racial balance within the St. Louis public schools by, among other things, reassigning students to achieve the greatest number of schools in which black students comprise be-

tween 30-50% of the student body. 491 F. Supp. 351, 356 (E.D. Mo. 1980). On the subject of interdistrict student transfers, the district court ordered the State, the United States and the City Board:

> To make every feasible effort to work out with the appropriate school districts in the [sic] St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation *in the City of St. Louis,* and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein.

Id. at 353 (emphasis added). The court of appeals (per Heaney, J.) affirmed the interdistrict busing aspects of the plan as a "valid part of the attempt to fashion a workable remedy *within the City.*" 667 F.2d 643, 651 (8th Cir.) (*"Liddell III"*) (emphasis added), *cert. denied*, 454 U.S. 1081 (1981).

On August 24, 1981, the district court added numerous St. Louis County suburban school districts and three County school officials as parties defendant, a step that was necessary because the City of St. Louis is an autonomous political subdivision separate from surrounding St. Louis County. The City Board, which had formerly been a nominal defendant, was realigned as a plaintiff. The district court ordered that the State bear half of the estimated $22.1 million cost of the desegregation plan for the 1980-81 school year, and *all* of the cost of the interdistrict busing program. The Eighth Circuit upheld these funding orders, reasoning that the State "can be required to take those actions which will further the desegregation of the city schools even if the actions required will occur outside the boundaries of the city school district." 677 F.2d 626, 630 (8th Cir. 1982) (Heaney, J.) (*"Liddell V"*).

On August 6, 1992, the trial court, on remand, entered an order scheduling a trial on interdistrict liability and disclosing the mandatory interdistrict plan it would impose

in the event an interdistrict violation was found. Under this sweeping plan originally proposed by the plaintiffs, the court would displace the traditional boundaries of the city and suburban school districts and create a single unified metropolitan school district with a uniform tax rate. Under the threat of this *in terrorem* interdistrict plan, the suburban school districts soon thereafter joined the plaintiffs in what the court of appeals described as a "unique and comprehensive settlement agreement designed to further desegregation in the city schools." *Liddell VII*, 731 F.2d 1294, 1297 (8th Cir. 1984) (*en banc*).

The proposed consent decree embodying the settlement —which the State did not sign or agree to—expressly recited that the suburban districts did not admit any liability for a constitutional violation, but nonetheless obligated them to cooperate with SLPS in desegregating the public schools located within the City of St. Louis. The plan included the busing of students between SLPS and the suburban school districts. There was no limit placed on the number of students who could be bused from the County districts into the City, but transfers from the City to the County were capped at 15,000. *Id.* at 1302. Moreover, suburban districts could reject any transfers of black students from the City that would raise the overall percentage of black students in the suburban district above 25%. *Id.* at 1302 n.7.

The plan also included numerous features in addition to busing that were likewise aimed at reconfiguring the racial makeup of the school districts in and surrounding the City of St. Louis. The respective districts agreed to implement affirmative action programs for the hiring of teachers and create additional magnet schools. Over the State's objection, the district court approved and entered judgment upon the proposed consent decree on July 5, 1983, thereby pretermitting the scheduled interdistrict violation hearing. 567 F. Supp. 1037 (E.D. Mo. 1983). As a result, there has *never* been any proof adduced—much less any finding entered—in this entire litigation

that either the State (or any officer, agency or instrumentality thereof) or the City's neighboring suburban school districts committed an interdistrict violation that segregated students by race across district lines.

Although the city and suburban districts agreed to these costly interdistrict arrangements, they did not propose to pay for them; instead, the financial burden was imposed upon the State. As the court of appeals put it, the State was to be "totally responsible for the costs of the voluntary interdistrict transfers, the magnet schools, and various part-time and alternative integrative programs." 731 F.2d at 1300. Additionally, the State would be required to pay receiving districts an annual cash payment for each transfer student and to make an annual cash "incentive" payment to the sending district for each student transferred across district lines to attend school. *Id.* at 1302. This so-called "phantom" payment is significant; for each student transferred the sending district receives a payment equal to one-half of the State aid that a district receives for resident students who actually attend school in that district. Lastly, the State would be required to "pay one-half of the cost of the quality improvements in the city schools and one-half of the capital improvements required by the plan." *Id.* at 1300.

The court of appeals, sitting *en banc*, affirmed the decree in relevant part. *Liddell VII*, 731 F.2d 1294 (8th Cir. 1984) (Heaney, J.). Insofar as pertinent here, the State challenged the interdistrict transfers, relying on this Court's holding in *Milliken I* that in a desegregation case "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." 418 U.S. 717, 745 (1974). The court declined to follow *Milliken I*, asserting that "the interdistrict transfers are intrinsic to an effective remedy for the intradistrict violations." 731 F.2d at 1302. To support its ruling, the Eighth Circuit cited (*id.* at 1307) *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), a case involving a desegregation

suit against the U.S. Department of Housing and Urban Development.

By virtue of the funding orders upheld by the court of appeals in the early 1980s, the City and participating County school districts have received significantly higher levels of State funding than school districts not under court order. By the 1994-95 school year, the most recent year for which the Missouri Department of Elementary and Secondary Education has comprehensive data available, the SLPS expended $8,132 per pupil. State Exh. 18A. This figure is substantially greater than the $4,553 per pupil average for the rest of the State, excluding Kansas City (which is also under federal court order). *Id.* Participating suburban school districts have also enjoyed the windfall benefits of the interdistrict funding orders in St. Louis. Many of these districts, including Clayton ($8,934) and Ladue ($8,487), spend between one and a half and two times the State average per pupil. *Id.* Because federal judges in St. Louis and Kansas City have commandeered a disproportionate share of the State educational budget, other school districts elsewhere in the State, both predominantly white (*e.g.*, Cole Camp—$3,409) and predominantly black (*e.g.*, Jennings—$3,772), have had far less revenue available to them. *Id.* Consequently, the funding orders here at issue profoundly distort the allocation of educational resources among local school districts throughout Missouri.

3. *Events Leading Up to the Court of Appeals' Decision.* Six years ago, in October 1991, the State first moved for a finding that the City schools had achieved "unitary" status, meaning that the vestiges of past *de jure* (or state-sponsored) segregation within the City of St. Louis had been eliminated. The court summarily denied that motion, and the State was required to continue funding the VIDT program at a weekly cost of $2 million. The State filed a new motion on May 7, 1992, this time requesting a declaration of partial unitary status. When one year had passed without the district court even scheduling a hearing, the State filed an amended unitary status motion in

November 1993. Two and a half years passed before the district court convened a hearing in March 1996.

While the unitary status motion languished before the district court, this Court issued its decision in *Jenkins III*, 515 U.S. 70 (1995), a case involving an equally protracted and expensive desegregation suit against the State concerning the Kansas City public schools. In his opinion for the Court, the Chief Justice reaffirmed the rule of *Milliken I*—namely, that "before a district court c[an] order an interdistrict remedy, there must be a showing that 'racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.'" *Id.* at 93 (quoting *Milliken I*, 418 U.S. at 745). *Jenkins III* also clarified that the rule of *Milliken I* was not limited or superseded by *Hills* v. *Gautreaux*, the sole authority upon which the court of appeals in this case had relied (*Liddell VII*, 731 F.2d at 1307). 515 U.S. at 97-98.

On April 23, 1996, after a three-week hearing on Missouri's unitary status motion, the court essentially announced that it would take no action for the foreseeable future. Notwithstanding the undisputed fact that St. Louis currently has no racially discriminatory practices, policies or procedures in any area of school operations, and notwithstanding *Jenkins III*, the district court refused to revisit its 16-year-old interdistrict funding orders. Instead, the court indefinitely suspended all further proceedings and referred the case for mediation to an outspoken advocate of interdistrict busing who, in December 1995, had petitioned the district court *in this very case* "to maintain the city-county busing program."[1] See *St. Louis Post-Dispatch*, Apr. 26, 1996, at A-12.

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[1] Since his appointment in this case, the mediator has publicly advocated retaining the interdistrict transfer program. *See, e.g., St. Louis Post-Dispatch*, Oct. 8, 1997, at A-4 (quoting the Settlement Coordinator as calling for State legislation to continue the VIDT program indefinitely as part of a long-term solution to the educational needs of SLPS).

Far from coordinating any phase-out of the State's invalid interdistrict funding obligations or any return of SLPS schools to local control, the Settlement Coordinator announced that his mission was to develop a "long range plan" for, as he would later explain, "improving the quality of education" in St. Louis.[2] In his pursuit of these and other lofty goals, the Settlement Coordinator has initiated but a handful of meetings over 19 months. In light of the unreasonable demands of plaintiffs and their school district allies, no negotiated resolution is even remotely in sight. In fact, both SLPS and plaintiffs' attorney have recently stated categorically that there will be no settlement unless the State enacts legislation continuing the interdistrict student busing program and guaranteeing in perpetuity a substantial *increase* in State funding for the SLPS to $9,556 per pupil per year, which is more than twice the Missouri average and nearly twice the national average of $5,600 per pupil. See *St. Louis Post-Dispatch*, Nov. 6, 1997, at C-1. As a result, more than twenty years after this case began, and a full six years after the State first moved for a declaration of unitary status, the State is still being required to fund the interdistrict busing program, with no end in sight.

Decision of the Court of Appeals

After failed attempts to secure stays pending appeal from the court of appeals and Circuit Justice Thomas and a failed attempt to secure immediate appellate review (105 F.3d 1208 (8th Cir. 1997) (Heaney, J.)), the State renewed its argument that this Court's intervening decision in *Jenkins III* compelled a phase-out of the interdistrict funding orders. The district court summarily overruled the objection, in an order dated April 10, 1997. Pet. App. 23a-24a. Again, the State was rebuffed on appeal by the Eighth Circuit per Judge Heaney. Pet. App. 1a.

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[2] *See St. Louis Post-Dispatch*, Apr. 26, 1996, at A-12; Memorandum from Settlement Coordinator to Interested Parties, at 2 (May 10, 1996).

The court of appeals ruled that the district court had properly declined to phase out the interdistrict busing program because *Jenkins III* does not cast doubt on the propriety of imposing interdistrict remedies to address intradistrict violations. The court indicated that, unlike the remedy invalidated in *Jenkins III* as unjustified absent an interdistrict violation, "neither 'desegregative attractiveness' nor 'suburban comparability' were the basis of" the interdistrict remedy in this case. Pet. App. 20a. The panel added that "[a] premise of *Jenkins III* was that the trial court specifically found that no interdistrict violation had taken place" (*id.* at 19a), whereas "[n]o such determination has been made here." *Id.* Recognizing that its proffered distinctions of *Jenkins III* conflict with the Court's opinion, the panel concluded its discussion with the following remarkable observation:

> There is, of course, language in the majority opinion in *Jenkins III* suggesting that no interdistrict relief can be granted unless an interdistrict violation or segregative effects have been proved. This language must be tempered by the facts in *Jenkins III* and limited nature of the actual holding. In our view, the question remains sufficiently open to permit us to follow our numerous precedents and hold that *Jenkins III* does not require us to hold that the [interdistrict busing program] must be terminated or phased out at this time.

Id. at 21a.[3]

The court of appeals also held that the district court had properly deferred ruling on whether the intradistrict viola-

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[3] Astonishingly, the Eighth Circuit has since ruled that, despite the complete reversal in *Jenkins III* on the only issue decided by the Court—namely, the validity of the interdistrict remedies in the absence of an adjudicated interdistrict violation—the plaintiffs in the *Jenkins* litigation were "prevailing parties" entitled to attorneys fees and costs payable by the State for their losing effort in this Court. *Jenkins* v. *Missouri*, No. 96-3870, 1997 WL 629800 (8th Cir. Oct. 14, 1997). The State is considering seeking this Court's review of that determination, which, like the decision here under review, adopted an exceedingly crabbed reading of *Jenkins III*.

tion had been abated through achievement of unitary status within SLPS. The Eighth Circuit held that, although "the St. Louis schools have achieved a high degree of integration" (Pet. App. 20a), the State's unitary status motion cannot be decided until the settlement process has run its course. *Id.* at 13a. The panel brushed aside the State's contention that an impasse exists on the question of halting new entrants into the VIDT program, stating tersely that "counsel for all the other parties disagreed" with that assessment. *Id.*[4] As a result, the State has been compelled to continue indefinitely funding the interdistrict remedies ordered more than a decade ago.

REASONS FOR GRANTING THE PETITION

To say that the decision below conflicts with this Court's decisions in *Milliken I* and *Jenkins III* would be an understatement. These decisions are absolutely dispositive on the validity of the interdistrict remedy ordered in this case, yet the Eighth Circuit has simply refused to follow the law as declared by this Court as recently as three Terms ago. The Eighth Circuit's decision is so clearly wrong under these precedents as to warrant summary reversal. The result of the lower court's refusal to heed the Court's mandate in *Jenkins III* is that a conflict has been injected into the previously uniform body of Circuit law. This body of law recognizes, in sharp contrast to the court below, that federal courts simply are not authorized to impose an interdistrict remedy on a State absent an express finding that there has been both an interdistrict violation of the Constitution and resulting interdistrict segregative effects. Given the important federalism and separation-of-powers interests that are jeopardized by the ruling below —not to mention respondents' continued assault on the State treasury—the Court should issue a writ of certiorari

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[4] The court instructed the district court that, in the event of an impasse, it should weigh against the State's request for a determination of unitary status the possibility that the effect of cessation of interdistrict busing efforts "w[ould] most probably be a significant resegregation of the city schools." Pet. App. at 17a.

to correct the manifest excesses of the court below and to provide needed guidance on these important issues of constitutional law.

I. THE EIGHTH CIRCUIT'S RULING THAT AN INTERDISTRICT VIOLATION IS NOT A PREREQUISITE FOR INTERDISTRICT RELIEF IS SO PLAINLY WRONG UNDER THIS COURT'S PRECEDENTS AS TO WARRANT SUMMARY REVERSAL.

The proper resolution of this case is controlled by a long line of decisions from this Court culminating in *Jenkins III*. The Eighth Circuit's contrary decision, which rests on a contrived distinction of *Jenkins III*, is so manifestly unsupportable under this Court's precedents that it should be summarily reversed.

a. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court admonished that "judicial powers may be exercised only on the basis of a constitutional violation." *Id.* at 16. Such a violation is not only necessary for judicial relief; it also determines the proper scope of relief. Although "breadth and flexibility are inherent in judicial remedies" (*id.* at 15), the "task" of a federal court in a desegregation case is necessarily limited "to correct[ing], by a balancing of the individual and collective interests, the condition that offends the Constitution." *Id.* at 16. Judicial performance of that critical task would "be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities," such as countering private housing choices or demographic factors. *Id.* at 22; see also, *e.g.*, *Milliken* v. *Bradley*, 433 U.S. 267, 281-82 (1977) ("*Milliken II*") ("well-settled" that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation").

As this Court squarely ruled in *Milliken I*, it is this fundamental rule of constitutional remedies—with its obvious federalism and separation-of-powers underpinnings

—that forbids interdistrict relief in the absence of a proven interdistrict violation. In that case, the district court found that the Detroit Board of Education and the State of Michigan had committed a series of constitutional violations in Detroit that produced a dual (or racially segregated) school system in Detroit. 418 U.S. at 725-27. Even though these findings were intradistrict in nature (*id.* at 738), and even though the neighboring suburban school districts had not been adjudged guilty of any violations, the court of appeals nonetheless imposed a sweeping interdistrict busing remedy that encompassed 53 suburban school districts (*id.* at 733-34), reasoning that " 'intra-city plans [are] inadequate to desegregate such schools.' " *Id.* at 732. This Court set aside the interdistrict remedy, holding that absent a finding of an interdistrict violation, "there is no constitutional power in the courts to decree [interdistrict] relief." *Id.* at 749.

This Court ruled that imposing an interdistrict remedy in such circumstances contravened the basic teaching of *Swann*, 402 U.S. at 744-45. Lest the point be lost, the Court reiterated, plainly and pointedly, that "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Id.* at 745; see also *id.* at 752 (restating its "holding" that "absent an interdistrict violation, there is no basis for an interdistrict remedy").

This Court reaffirmed these principles in *Jenkins III*, 515 U.S. 70 (1995), and made clear that they apply to the "voluntary" interdistrict remedies favored by the Eighth Circuit. In Kansas City, as here, the State of Missouri was compelled to finance extravagant interdistrict measures on a record where the only constitutional violations found were confined to the Kansas City public schools and thus were purely intradistrict in nature. Contrary to the short-shrift *Milliken I* received from the court below, *Jenkins III* grounded its entire analysis on the principles announced in that case: "[I]n *Milliken I*, we held that a District Court exceeded its authority in fashioning interdistrict relief where the surrounding school districts

had not themselves been guilty of any constitutional violation." *Id.* at 87 (citation omitted); see also *id.* at 93. "The proper response to an intradistrict violation," *Jenkins III* ruled, "is an intradistrict remedy." *Id.* at 90. The dissent concurred in the view that "there is error in imposing an interdistrict remedy to cure a merely intradistrict violation," which it described as "a rule of law that can claim both precedential support and intuitive sense." *Id.* at 158-59 (Souter, J., dissenting). Accordingly, the Court set aside the interdistrict remedies ordered in the Kansas City litigation (*e.g.*, the creation of city schools so attractive as to induce suburban white students to transfer into black inner-city schools), which the Court viewed as materially identical to the cross-district student transfers involved in *Milliken I*.

Crucial to its result, *Jenkins III* distinguished *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), the sole case on which the court of appeals here relied when it initially approved the interdistrict funding orders against the State (*Liddell VII*, 731 F.2d at 1307-08). *Jenkins III* ruled: "*Gautreaux* . . . involved the imposition of a remedy upon a federal agency. Thus, it did not raise the same federalism concerns that are implicated when a federal court issues a remedial order against a State." 515 U.S. at 98; see also *id.* at 105-06 (O'Connor, J., concurring) ("*Gautreaux*, however, does not eliminate the [rule] of *Milliken I* . . .; if anything, our opinion repeatedly reaffirmed that principle[.]"). Therefore, as Justice O'Connor concluded in agreement with the Court, "*Gautreaux* simply does not give federal courts a blank check to impose unlimited remedies upon a constitutional violator." *Id.* at 106.

These precedents are thoroughly dispositive here. First, there can be no question that busing students across district lines is an interdistrict remedy within the meaning of *Milliken I* and *Jenkins III*; indeed, both decisions explicitly denominate interdistrict busing as such, see *id.* at 92; *Milliken I*, 418 U.S. at 744-45. Second, it is equally clear that no interdistrict violation causing segregative

effects in St. Louis was found to have been committed in this case by anyone, including the State and the suburban school districts. There has never even been a hearing or the submission of proofs, much less an adjudication, on the interdistrict violation issue. Accordingly, the courts below have properly conceded that this case involves solely an intradistrict violation. See, *e.g.*, *Liddell VII*, 731 F.2d at 1297 (remedies "designed to further desegregation in the city schools"); *Liddell* v. *Board of Educ.*, 567 F. Supp. 1037, 1059 (E.D. Mo. 1983) ("interdistrict efforts" were intended "to remedy the segregated conditions found to exist within the City [of St. Louis]"). Therefore, *Jenkins III* and *Milliken I* compel the conclusion that the interdistrict funding obligations imposed on the State for the last decade over its steadfast objection are patently in excess of federal remedial authority under the Constitution.

b. Disturbed by the prospect of having to release the State from what it suggested was " 'the most creative social experiment of our time' " (Pet. App. 14a n.8 (quoting district court)), the Eighth Circuit simply refused to follow *Jenkins III*. It purported to distinguish the case on two grounds. Both are specious.

First, the court indicated that the Chief Justice's opinion for the Court in *Jenkins III*—which it inexplicably deemed only a "plurality opinion" (Pet. App. 20a)—applies only where the interdistrict remedy in question is intended to promote the " 'desegregative attractiveness' " of city schools to students in other districts or " 'suburban comparability.' " *Id.* This asserted distinction does not withstand even cursory analysis. There is nothing special about orders promoting "desegregative attractiveness" or "suburban comparability," as distinguished from other interdistrict remedies, that limits their use to situations where interdistrict violations have been proven. To the contrary, under *Jenkins III any* "remedy with an interdistrict purpose" is *ultra vires* absent findings of an interdistrict violation and segregative effect. 515 U.S. at 97. Indeed, the notion that *Jenkins III* is limited to orders

promoting the goals of "desegregative attractiveness" or "suburban comparability" is dispelled by the fact that the Court explicitly concluded that absent a proven interdistrict violation, a court "lacks the remedial authority" to order "the interdistrict transfer of students." *Id.* at 92. In fact, *Milliken I*, the central precedent for *Jenkins III*, struck down an interdistrict busing remedy that plainly served neither goal.

Second, the panel held that *Jenkins III* puts interdistrict relief beyond federal judicial reach only where the "trial court [has] specifically found that no interdistrict violation had taken place." Pet. App. 19a. As even the court below was constrained to concede (*id.* at 21a), the language of *Jenkins III* is flatly inconsistent with this tortured reading of the case. The Court did not hold merely that interdistrict remedies are inappropriate where it has been found that no interdistrict violation occurred—a holding that would be essentially tautological. Rather, the Court held, as it had in *Milliken I*, that interdistrict relief is improper as a matter of law *unless* there is a predicate finding of an interdistrict violation that caused interdistrict segregation. See, *e.g.*, *Jenkins III*, 515 U.S. at 97-98 ("A district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects . . . exceeds its remedial authority if it orders a remedy with an interdistrict purpose.") (citation omitted); *Milliken I*, 418 U.S. at 745 ("[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."). Whether there is a finding of no interdistrict violation, or simply no adjudication of whether or not such a violation occurred, is beside the point—the court is left solely with an intradistrict violation, and the clear rule of *Jenkins III* is that "[t]he proper response to an intradistrict violation is an intradistrict remedy." 515 U.S. at 90.

c. Perhaps recognizing the insufficiency of its attempts to avoid this Court's unambiguous mandate in *Jenkins III*, the court of appeals added a self-styled "due process" rationale for its decision. The court ruled that, because

the suburban school districts have voluntarily accepted transfer students from the City for 12 years in reliance on State funding, vacating the interdistrict funding decree against the State "would violate their fundamental right to due process." Pet. App. 19a. This holding—for which the court tellingly cited no authority—is nothing short of astonishing.

The unconstitutional interdistrict funding orders did not confer on those districts (or anyone else) a right to retain State funding for interdistrict remedies. Injunctions and consent decrees, by definition, do not confer or create rights; rather, they enforce preexisting rights and obligations under current law and conditions. See, *e.g.*, *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). As such, there can be no protectible reliance on an injunction or a consent decree because such orders "always" remain subject to modification, *id.* at 114, particularly in the context of school desegregation remedies which are necessarily "intended as a temporary measure." *Freeman* v. *Pitts*, 503 U.S. 467, 489 (1992); see also *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991). Given this fact, in addition to the inherently forward-looking nature of injunctive relief, there can be no legitimate reliance interests that would stand in the way of correcting the remedial excesses of the lower courts in the wake of *Jenkins III*. See *Agostini* v. *Felton*, 117 S. Ct. 1997, 2006 (1997) (holding that "[a] court errs when it refuses to modify an injunction or consent decree" in light of changes in the factual or legal landscape); see also, *e.g.*, *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992); *System Fed'n No. 91 Ry. Employee's Dep't* v. *Wright*, 364 U.S. 642, 647 (1961). The Eighth Circuit's novel conception of due process, therefore, fails to provide even a colorable justification for refusing to follow *Jenkins III*.[5]

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[5] Indeed, the court of appeals' concern about the unfairness of applying *Jenkins III* to upset the reliance of plaintiffs and their school district allies on prior law smacks of the "selective prospectivity" this Court has condemned as inconsistent with the proper judicial function under Article III. *See Reynoldsville Casket*

The irony of the court's concern for the "rights" of suburban school districts is palpable given its complete lack of concern for the rights of the State of Missouri throughout this protracted litigation. Due process concerns notwithstanding, the State has *never* had a hearing regarding its interdistrict liability, yet it has been compelled to pay more than $1 billion on extensive interdistrict remedies. Pet. App. 25a. The fact that plaintiffs and the City and County districts agreed among themselves to interdistrict relief does not—and *cannot*, consistent with due process—bind the State to fund such relief. See, *e.g.*, *Local No. 93 Int'l Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). Of course, as previously shown, at least since *Jenkins III*, if not *Milliken I*, the State's intradistrict liability does not justify any requirement that it undertake interdistrict remedial efforts.

Likewise insufficient is the possibility that termination of interdistrict relief might result, in the court of appeals' words, in "resegregation of the city schools" (Pet. App. 17a). As Justice Kennedy explained for the Court in *Freeman* v. *Pitts*:

> Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been

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Co. v. *Hyde*, 514 U.S. 749, 752 (1995); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993). As this Court ruled in *Harper*: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . In both civil and criminal cases, we can scarcely permit 'the substantive law [to] shift and spring' according to 'the particular equities of [individual parties'] claims' of actual reliance on an old rule and harm from a retroactive application of the new rule." *Id.* (quoting *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 543 (1991) (plurality opinion of Souter, J.)). Because *Jenkins III* applied the rule it announced to the case before it, and because this case was pending in court at that time, the Eighth Circuit was required to do the same in this case.

> remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.

503 U.S. at 494; see generally *Jenkins III*, 505 U.S. at 91 (explaining that "we have rejected the suggestion 'that schools which have a majority of Negro students are not 'desegregated' whatever the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered' ") (quoting *Milliken I*, 418 U.S. at 747 n.22); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 436 (1976) (same as to demographic shifts "not attributed to any segregative acts on the part of the [school district]").

In short, it is well settled by numerous precedents from this Court that federal courts may not compel States to fund or otherwise participate in interdistrict remedies absent an adjudication of interdistrict liability. This principle is dispositive here because there has admittedly been no finding that the State or any suburban school district committed any interdistrict violations, much less interdistrict violations that produced racial segregation across district lines. By upholding the interdistrict remedies against the State *in toto*, the Eighth Circuit has reached the very unconstitutional result condemned by this Court's precedents and has overstepped the bounds of its proper remedial authority.

d. The decision below is so clearly contrary to *Jenkins III* and *Milliken I* that this Court should enter a summary reversal order. Although this Court's primary function is not the correction of errors, it is well established that "summary disposition is appropriate to correct clearly erroneous decisions of lower courts." R. Stern, *et al.*, Supreme *Court Practice* § 5.12(c), at 251 (7th ed. 1993) (citing cases). As a consequence, this Court has not hesitated to reverse summarily when a lower court has "refus[ed] to recognize that [its] case was controlled" by this Court's precedents, *United States* v. *Nachtigal*, 507 U.S. 1, 5 (1993) (*per curiam*), or has otherwise decided a case in a manner plainly contrary to such precedents. See,

e.g., *Bibles* v. *Oregon Natural Desert Ass'n*, 117 S. Ct. 795, 795 (1997) (*per curiam*). As this Court has noted "it is an odd notion of judicial restraint that would compel us to cast a blind eye on overreaching by lower federal courts," especially where, as here, the overreaching implicates federalism concerns. *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2072 (1996) (*per curiam*) (summarily reversing appellate decision invalidating entire state statute contrary to express severability provision); see also *Wood* v. *Bartholomew*, 116 S. Ct. 7, 11 (1995) (*per curiam*) (granting summary reversal where, as a result of lower court's erroneous order, "the proper delicate balance between the federal courts and the States is upset").

These decisions provide ample precedent for entry of an order of summary reversal correcting the Eighth Circuit's manifestly mistaken view of the proper scope of the remedial authority of the federal courts in school desegregation cases. That the court of appeals' order upsets the delicate balance between the federal courts and the States cannot be denied. With the approbation of the court below, vast sums of money will continue to be commandeered from the State budget, over the State's objection, to fund costly interdistrict remedies that, as a matter of law, are not an appropriate response to the intradistrict violation found to have occurred decades ago within the geographic confines of the City of St. Louis.

The scope of the interdistrict remedies imposed on the State is, by any measure, staggering. As of February 1996, the State had expended more than $1 billion on the interdistrict components of this remedy alone. Pet. App. 25a. The current annual cost to State taxpayers of continuing the interdistrict transfer program is in excess of $100 million. *Id.* This is unquestionably a significant amount of money, which the State could otherwise devote to a host of other vital and underfunded competing State programs.

This is not merely a question of money; it is a question of freedom and of local autonomy. The requirement that the State continue, for the foreseeable future, to fund

busing and other extensive interdistrict remedies after more than a decade of active desegregation efforts—efforts that have *already* brought SLPS a "high degree of integration" (Pet. App. 20a)—has deprived the State of its fundamental right to decide for itself, free from judicial command, how best to allocate its resources. Under the Constitution, the political institutions of the State of Missouri, and *not* federal judges, are entitled to make these types of spending decisions through the normal democratic process. See *Jenkins III*, 515 U.S. at 133 (Thomas, J., concurring) (explaining that "budgeting" is a function that "involve[s] a legislative or executive, rather than a judicial, power" and that "[f]ederal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff").

In this sense, the decision below is especially worthy of review on the fundamental question of the legitimacy of the interdistrict remedy foisted upon the State. The Eighth Circuit's decision "is not merely an erroneous adjudication of a lawsuit between private litigants, but an improper intrusion by a federal court into the workings of [a governmental body]." *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., *in chambers*) (granting stay pending appeal). As Justice Thomas explained in *Jenkins III*, "[a] structural reform [school desegregation] decree eviscerates a State's discretionary authority over its own program and budgets and . . . strip[s] state and local governments of one of their most important governmental responsibilities." 515 U.S. at 131 (concurring opinion).

Consistent with this assessment, the Court has repeatedly recognized that school desegregation orders implicate serious "federalism concerns," *id.* at 99 (majority opinion), not to mention "separation of powers" considerations stemming from judicial arrogation of legislative and executive functions. *Id.* at 131 (Thomas, J., concurring); see also *id.* at 112-13 (O'Connor, J., concurring) (same). These grave constitutional implications arising from the Eighth Circuit's overreaching in this sensi-

tive area warrant authoritative guidance from this Court, at this time, on the legitimacy of the interdistrict aspects of the remedies imposed on the State. This Court should enter an order of summary reversal directing the Eighth Circuit to phase out the interdictrict funding orders against the State by barring new entrants into the VIDT program.

II. THE JUDGMENT OF THE COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF OTHER CIRCUITS, WHICH HAVE UNIFORMLY RECOGNIZED THAT AN INTERDISTRICT REMEDY IS IMPROPER ABSENT A PROVEN INTERDISTRICT VIOLATION.

At a minimum, the Court should grant certiorari to resolve the Circuit split the Eighth Circuit's ruling in this case has created concerning the propriety of awarding interdistrict relief in the absence of express findings of interdistrict constitutional violations. Prior to the court of appeals' rulings in this case, the Circuits uniformly recognized that under *Milliken I* and its progeny, an interdistrict remedy simply cannot stand without an adjudged predicate interdistrict violation found to have produced interdistrict racial segregation. In the event the Court elects not to reverse summarily, a writ of certiorari should issue to resolve this Circuit split and clarify the relationship between *Milliken I* and *Jenkins III* and the appropriate constitutional limits on federal remedial authority over the States.

As previously indicated, the court below held that interdistrict remedies may freely be imposed, as a means of redressing a purely intradistrict violation, as long as there is no express finding that no interdistrict violation occurred (Pet. App. 19a), and as long as the interdistrict decree does not serve the goals of "desegregative attractiveness" or "suburban comparability." *Id.* at 20. Numerous decisions from other Circuits stand in square conflict with the ruling of the Eighth Circuit below; *none* has reached any similar ruling.

The ruling of the Fifth Circuit in *Lauderdale County School District* v. *Enterprise Consolidated School District*, 24 F.3d 671 (1994), is typical of the decisions that observe the constitutional limitations on the use of interdistrict desegregation remedies. There, the magistrate judge ordered interdistrict busing after finding that neighboring school districts had taken certain interdistrict actions (*e.g.*, annexations of territory in neighboring districts and acceptances of cross-district student transfers) with respect to a school district that later developed a racially identifiable school. The court of appeals ruled that there was "no question" that the magistrate could enjoin unlawful interdistrict transfers that produced segregated schools, but that "[i]t is a different question, however, whether a court can order the interdistrict transfer of students." *Id.* at 683. For guidance on that question, the Fifth Circuit turned to *Milliken I*. *Id.*

In contrast to the Eighth Circuit's ruling below that an interdistrict remedy may be proper without an adjudicated interdistrict violation, the Fifth Circuit squarely held to the contrary. In *Lauderdale*, the court ruled that "*Milliken* [*I*] requires that an interdistrict remedy be imposed only upon 'proof of unconstitutional governmental action that has been a substantial cause of a significant interdistrict segregative effect.' " *Id.* at 684 (quoting *Lee* v. *Lee County Bd. of Educ.*, 639 F.2d 1243, 1256 (5th Cir. 1981)); see generally *United States* v. *Mississippi*, 921 F.2d 604, 607 (5th Cir. 1991) ("*Milliken* imposes a two-step analysis (1) effect—has the complained of state or local act had a segregative effect across district lines; and (2) intent—was the complained of act done with segregative intent. Both prongs of the test must be met to justify interdistrict relief."). Because the necessary predicate findings for interdistrict relief could not be made on the record, the *Lauderdale* court reversed the interdistrict busing order.

Several other Circuits have reached the same conclusions on the propriety of interdistrict remedies in desegregation cases. The court in *Stout* v. *Jefferson County*

Board of Education, 845 F.2d 1559 (11th Cir. 1988), put the matter bluntly: "Interdistrict relief is inappropriate absent a demonstration of an interdistrict violation and an interdistrict effect." *Id.* at 1562 (citing *Milliken I*); see also *Goldsboro City Bd. of Educ.* v. *Wayne County Bd. of Educ.*, 745 F.2d 324, 332 (4th Cir. 1984) (holding that *Milliken I*'s requirement of proven interdistrict violations constitutes a "formidable hurdle" that "a plaintiff must overcome . . . to obtain interdistrict relief"); *Berry* v. *School Dist.*, 698 F.2d 813, 817-18 (6th Cir. 1983) ("[S]chool desegregation case law in the Supreme Court limits this [interdistrict] remedy to situations where the race discrimination and intentional segregative practices are such as to have been a substantial cause of the condition which requires interdistrict solution."), *cert. denied*, 464 U.S. 892 (1983); *United States* v. *Board of School Comm'rs*, 637 F.2d 1101, 1104 (7th Cir.) ("[A]n interdistrict remedy such as that ordered by the district court must be predicated on a finding that official action, taken with a discriminatory purpose, was a substantial cause of interdistrict segregation.") (citations omitted), *cert. denied*, 449 U.S. 838 (1980). As Chief Judge Posner recently wrote for the Seventh Circuit, absent findings of interdistrict violations and segregative effect, "[j]udges may not issue busing orders . . . that send the kids outside the boundaries of the public school district in which they live." *United States* v. *Board of School Comm'rs*, No. 97-1530, 1997 WL 631330, at *2 (7th Cir. Oct. 14, 1997).

Each of these decisions is completely faithful to *Milliken I* and *Jenkins III*, and in square conflict with the Eighth Circuit's ruling here. Contrary to the court below, these decisions expressly hold that interdistrict relief simply may not be granted absent an explicit finding (as opposed to mere allegations) of an interdistrict violation. Compare, *e.g.*, *Lee*, 639 F.2d at 1265 (holding that an "*express finding*" is "necessary to support interdistrict relief under *Milliken*") (emphasis added); *Board of School Comm'rs*,

637 F.2d at 1104 (holding that interdistrict remedies "*must be predicated on a finding*" sufficient under *Milliken I*) (emphasis added) *with* Pet. App. 19a (interdistrict remedy proper here because "from the beginning the plaintiffs asserted interdistrict violations"). Here, neither court below made a finding that an interdistrict violation occurred because, at the request of plaintiffs, SLPS and the suburban school districts, no interdistrict violation hearing was ever conducted. By affirming a concededly interdistrict remedy notwithstanding the admitted absence of express findings of any interdistrict violation, the Eighth Circuit created a conflict with the Fourth, Fifth, Sixth and Seventh Circuits, all of which correctly recognize that such findings are the constitutional *sine qua non* for interdistrict relief. This Court should grant certiorari to resolve this Circuit conflict and, in doing so, to clarify the constitutional limitations on the remedial authority of the federal courts over the States.

III. THIS COURT'S INTERVENTION IS GRAVELY NEEDED TO CORRECT THE SYSTEMATIC OVERREACHING THAT HAS OCCURRED IN THIS LITIGATION AND TO VINDICATE THE FEDERALISM AND SEPARATION-OF-POWERS CONCERNS EMBODIED IN *JENKINS III* AND *MILLIKEN I*.

There are substantial reasons for this Court to hear this case at this time. First, the sheer cost and scope of the remedies the State has been required to fund for more than a decade, and the attendant loss of control of State budgetary decisions, are of such proportions as to merit a determination of the fundamental legitimacy of the interdistrict remedial phase under *Jenkins III* before further scarce time and resources are expended on remedies that lack a constitutional basis. Second, the history of this case shows that this entire proceeding has been collusive between the plaintiffs and their school district allies, and none of the courts below (and certainly not the parties who have benefitted financially at the State's expense) has any interest in facilitating achievement of the end goal of all desegregation cases—the return of local schools to the

control of local governing bodies operating in compliance with the Constitution. These factors, in addition to the sheer importance of the issues raised, provide compelling reasons for this Court's intervention at this juncture as the State enters its third decade of federal court rule in St. Louis.

a. This Court's decisions at the certiorari stage have reflected the national importance of providing clear guidance in desegregation cases and facilitating the earliest practicable phase-out of the federal courts' tutelage over state and local institutions. In recent years, this Court has repeatedly heard cases involving challenges to school desegregation orders that, like those entered in this case by the courts below, have spanned decades. See, *e.g.*, *Jenkins III*, 515 U.S. 70 (1995); *Freeman* v. *Pitts*, 503 U.S. 467 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990) ("*Jenkins II*"). The Court has also repeatedly admonished lower federal courts that it is "essential" that they "[r]eturn[] schools to the control of local authorities *at the earliest practicable date.*" *Freeman*, 503 U.S. at 490 (emphasis added). The " 'vital national tradition' " of " 'local autonomy of school districts' " requires no less. *Id.* (quoting *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977)). In light of these cases, it should be clear that the issue the State presents concerning the legitimate scope of the interdistrict remedial orders entered against it in this 25-year-old desegregation case is worthy of this Court's review.

The pendency of proceedings before the Settlement Coordinator provides no reason for this Court to postpone reining in the constitutional excesses of the Eighth Circuit. Although the court of appeals ruled that the State's motion for a declaration of unitary status concerning the *intra*district violation cannot be taken up while settlement negotiations are pending, it did *not* view those negotiations as reason not to consider the entirely distinct (and purely

legal) question of the validity of the *inter*district remedies herein at issue. To the contrary, the court of appeals squarely addressed that issue on the merits and definitively held that, despite *Jenkins III*, the interdistrict remedies imposed on the State are a valid means of redressing the State's adjudged intradistrict violation (Pet. App. 20a-21a). To defer review of the validity of those interdistrict remedies would not only be unjustified; it would work a severe injustice on the State and its citizens by requiring the continued funding of interdistrict remedies for years to come—without *any* prospect of recouping those funds at a later time—despite the conceded absence of any finding of an interdistrict violation warranting interdistrict relief.

Another reason for the Court not to stay its hand at this point is that plaintiffs, SLPS and their suburban school district allies are using the settlement process not as a means of winding up federal court supervision in St. Louis, but rather as a means of extracting a permanent (and even more costly) remedy from the Missouri Legislature, euphemistically described by plaintiffs' attorney as "a new investment in education." Transcript of Hearings of Missouri Joint Interim Committee on School Desegregation and Finance Issues, at 323 (Oct. 7, 1997) (testimony of William Taylor). Only last month, he warned the Legislature that the only way to reach a settlement in this case is for the State to "institutionalize and improve" the court-ordered plan. *Id.* at 332. Similarly, SLPS recently demanded that any settlement in St. Louis be conditioned on enactment of a state statute locking in permanent annual funding for SLPS of $9,556 per pupil (with adjustments for inflation), over and above the $865 million SLPS has demanded for capital and non-operational needs and the $1.6 billion the State has already expended on desegregation funding for St. Louis. See *St. Louis Post-Dispatch*, Nov. 7, 1997, at A-1; *id.*, Nov. 6, 1997, at C-1. These patently unreasonable demands by respondents show that the settlement process is not being used

for a legitimate purpose, and will not, through no fault of the State, lead to any settlement.

b. Finally, this Court should not close its eyes to the fact that this case presents unusually compelling circumstances warranting this Court's intervention. The entire history of the 17-year remedial phase of this proceeding has been characterized by collusion and delay, all for the purpose of endlessly delaying achievement of the "ultimate objective" in school desegregation cases, which is "to return school districts to the control of local authorities." *Freeman*, 503 U.S. at 489. SLPS has been a "friendly adversary" of respondents, acquiescing with alacrity in each new program proposed by respondents and ordered by the district court at the State's expense, and vigorously opposing any limitation on such programs. *Cf. Jenkins III*, 515 U.S. at 99-100 (noting same characteristic of Kansas City case); see also *Jenkins II*, 495 U.S. at 76 (Kennedy, J., concurring in part and concurring in judgment). The strategy has succeeded, to the tune of $1.6 billion to date and $2.9 million per week going forward, with the inequitable result that the average per-pupil expenditure in St. Louis is almost double that of the average for the rest of the State. State Exh. 18a.

The opinion of the court of appeals has exacerbated this problem by essentially creating a perpetual interdistrict remedy machine. The court warned that any cessation of the interdistrict busing program would "increas[e] the degree of segregation in [City] schools." Pet. App. 17a. Ignoring the effect of private housing choices and demographic trends, the court even went so far as to suggest that termination of court-ordered State funding *itself* might trigger a constitutional violation to the extent "significant resegregation of the city schools" would result from cessation of the interdistrict program. *Id.* As a result, the district court cannot terminate the interdistrict funding decree (for to do so would result in "resegregation" in the City), yet the existence of that decree gives suburban school districts a due process right (according

to the court of appeals) to compel the State to continue funding the interdistrict remedies indefinitely.

In sum, the logic of the court of appeals ensures that the interdistrict remedy will be self-perpetuating. The only possible brake on this unconstitutional bootstrapping scheme is for the State to achieve a settlement, but the court's sweeping orders have, of course, removed any incentive respondents might otherwise have to bring this funding windfall to a halt. As the turn of events in the *Missouri* v. *Jenkins* litigation ably demonstrates, it is only decisive action by this Court that will motivate the parties to reach a negotiated resolution of these disputes. See *Jenkins* v. *Missouri*, 122 F.3d 588 (8th Cir. 1997) (approving, over plaintiffs' objections, settlement agreement between the State and the Kansas City school district reached as a result of this Court's decision in *Jenkins III*). Absent such action by this Court, the State—and all of its citizens—will continue to be the victim of the systematic overreaching that unfortunately has characterized the entire 17-year-long remedial phase of this case.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal in this case.

Respectfully submitted,

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November 25, 1997

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-2009

Appeal from the United States District Court
for the Eastern District of Missouri

MICHAEL C. LIDDELL, a minor, by MINNIE LIDDELL, his mother and next friend; KENDRA LIDDELL, a minor, by MINNIE LIDDELL, her mother and next friend; MINNIE LIDDELL; RODERICK D. LEGRAND, a minor, by LOIS LEGRAND, his mother and next friend; LOIS LEGRAND; CLODIS YARBER, a minor, by SAMUEL YARBER, his father and next friend; SAMUEL YARBER; EARLINE CALDWELL; LILLIE CALDWELL; GWENDOLYN DANIELS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

CITY OF ST. LOUIS,

Plaintiff,

v.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS; HATTIE R. JACKSON, President, Board of Education of the City of St. Louis; REV. EARL E. NANCE, JR., a member of the Board of Education of the City of St. Louis; RENNI B. SHUTER, a member of the Board of Education of the City of St. Louis; PAULA V. SMITH, a member of the Board of Education of the City of St. Louis; DR. ALBERT D. BENDER, SR., a member of

the Board of Education of the City of St. Louis; EDDIE G. DAVIS, a member of the Board of Education of the City of St. Louis; EDDIE G. DAVIS, a member of the Board of Education of the City of St. Louis; DR. JOHN P. MAHONEY, a member of the Board of Education of the City of St. Louis; MARYBETH MCBRYAN, a member of the Board of Education of the City of St. Louis; THOMAS M. NOLAN, a member of the Board of Education of the City of St. Louis; WILLIAM PURDY, a member of the Board of Education of the City of St. Louis; ROBBYN G. WAHBY, a member of the Board of Education of the City of St. Louis; MADYE HENSON WHITHEAD, a member of the Board of Education of the City of St. Louis; DR. CLEVELAND HAMMONDS, JR., Superintendent of Schools for the City of St. Louis,

Defendants-Appellees,

RONALD LEGGETT, St. Louis Collector of Revenue,

Defendant,

STATE OF MISSOURI; MEL CARNAHAN, Governor of the State of Missouri; JEREMIAH (JAY) W. NIXON, Attorney General; BOB HOLDEN, Treasurer; RICHARD A. HANSON, Commissioner of Administration; ROBERT E. BARTMAN, Commissioner of Education; MISSOURI STATE BOARD OF EDUCATION, and its members; THOMAS R. DAVIS; GARY M. CUNNINGHAM; SHARON M. WILLIAMS; PETER F. HERSCHEND; JACQUELINE D. WELLINGTON; BETTY E. PRESTON; RUSSELL V. THOMPSON; RICE PETE BURNS,

Defendants-Appellees,

SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY; AFFTON BOARD OF EDUCATION; BAYLESS BOARD OF EDUCATION; BRENTWOOD BOARD OF EDUCATION; CLAYTON BOARD OF EDUCATION; FERGUSON-FLORISSANT BOARD OF EDUCATION; HANCOCK PLACE BOARD OF EDUCATION; HAZELWOOD BOARD OF EDUCATION; JENNINGS BOARD OF EDUCATION; KIRKWOOD BOARD OF EDUCA-

TION; LADUE BOARD OF EDUCATION; LINDBERGH BOARD OF EDUCATION; MAPLEWOOD-RICHMOND HEIGHTS BOARD OF EDUCATION; MEHLVILLE BOARD OF EDUCATION; NORMANDY BOARD OF EDUCATION; PARKWAY BOARD OF EDUCATION; PATTONVILLE BOARD OF EDUCATION; RITENOUR BOARD OF EDUCATION; RIVERVIEW GARDENS BOARD OF EDUCATION; ROCKWOOD BOARD OF EDUCATION; UNIVERSITY CITY BOARD OF EDUCATION; VALLEY PARK BOARD OF EDUCATION; WEBSTER GROVES BOARD OF EDUCATION; WELLSTON BOARD OF EDUCATION; ST. LOUIS COUNTY; BUZZ WESTFALL, County Executive; JAMES BAKER, Director of Administration, St. Louis County, Missouri; ROBERT H. PETERSON, Collector of St. Louis County "Contract Account," St. Louis County, Missouri,

Defendants-Appellees,

THE ST. LOUIS CAREER EDUCATION DISTRICT,

Defendant,

ST. LOUIS TEACHERS' UNION, LOCAL 420, AFT, AFL-CIO,

Intervenor Below.

Submitted: July 17, 1997

Filed: September 25, 1997

Before McMILLIAN, HEANEY, and FAGG, Circuit Judges.

HEANEY, Circuit Judge.

The State of Missouri (State) appeals from an April 10, 1997 order of the United States District Court for the Eastern District of Missouri denying the State's motion to end all efforts to recruit and admit new students into the

voluntary interdistrict transfer plan (VITP) for the 1997-98 school year. The State contends that the district court acted contrary to the United States Supreme Court's decision in *Missouri v. Jenkins,* 115 S. Ct. 2038 (1995) (*Jenkins III*) in denying its motion. We do not believe that it did.

On April 23, 1996, the district court appointed Dr. William H. Danforth as settlement coordinator with the responsibility and authority to conduct conferences with all persons involved in the case, to secure the services of experts, and to stimulate negotiations among the parties. Dr. Danforth continues in this capacity as of the date of this opinion. Moreover, the district court has under consideration a motion by the State to have the St. Louis School District declared unitary. Given the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying the State's motion to phase out the voluntary transfer of black city students to county districts pending settlement negotiations. We encourage the parties to proceed diligently with their negotiations and believe that the settlement coordinator should be permitted to complete this important assignment. We urge the district court to ascertain the status of the negotiations, and in the event the negotiations reach an impasse, the district court should promptly rule on the pending unitary status motion. We affirm the order of the district court.

Background

The early history of this litigation is chronicled in our earlier opinions and will only be summarized here.[1] In

[1] *See Liddell v. Board of Educ.*, 882 F.2d 298 (8th Cir. 1989); *Liddell v. Board of Educ.*, 873 F.2d 191 (8th Cir. 1989); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469

1972, the plaintiffs brought an action against the Board of Education of the City of St. Louis (City Board) alleging that the city schools were segregated by race as a matter of state law and practice. Thereafter, the State of Missouri was joined as a party defendant. The plaintiffs and the United States as amicus submitted desegregation plans to the district court. The district court held a trial and found no constitutional violation. We reversed, holding that prior to 1865 the State prohibited the creation or maintenance of schools for teaching black children to read or write and that, after that date until 1980, the City Board and the State were jointly responsible for maintaining a segregated school system. *Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980).[2] We further noted that the City Board and the State failed to take effective measures to desegregate the school system in the years immediately following *Brown v. Board of Education*, 347 U.S. 483 (1954). We remanded the matter to the district court with directions to develop and implement a plan to integrate the St. Louis public schools.

On remand, the district court ordered the implementation of a mandatory desegregation plan within the city schools with funding to be shared equally by the City Board and the State. The district court directed the City Board and the State to develop and submit plans to alleviate the segregated conditions within the city schools through interdistrict transfers between the city and the suburban school districts. *Liddell v. Board of Educ.*, 491 F. Supp. 351 (E.D. Mo. 1980). The Liddell and Caldwell plaintiffs (representing black parents and stu-

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• U.S. 816 (1984) (*Liddell VII*); *Liddell v. Board of Educ.*, 677 F.2d 626 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982) (*Liddell V*); *Liddell v. Board of Educ.*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981) (*Liddell III*); and *Adams v. United States*, 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 499 U.S. 826 (1980).

[2] Only one party, the Adams plaintiffs, petitioned the Supreme Court for a writ of certiorari. The State did not file a petition.

dents) and the Adams plaintiffs (representing white parents and students) appealed.[3] The State contended that it should not be required to pay any of the costs of integration and specifically challenged paragraph 12 of the district court's order which provided:

> 12. The State defendants, the United States, and the St. Louis Board of Education are ordered and directed as follows:
>
> > a) To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that inter-district pupil transfers will not impair the desegregation of the St. Louis school district ordered herein, and submit such plan to the Court for approval by July 1, 1980.

Id. at 353. We affirmed, noting that "the voluntary exchanges contemplated by section [12](a) must be viewed as a valid part of the attempt to fashion a workable remedy within the City." *Liddell v. Board of Educ.*, 667 F.2d 643, 651 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

On August 24, 1981, the district court added eighteen St. Louis County suburban school districts (County Districts) as parties defendant and entered various other orders relating to desegregation of the city schools. The County Districts, the State, and the City Board appealed. The State contended that it could not be required to implement a remedy affecting County Districts until a

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[3] The Liddell plaintiffs contended that the plan did not go far enough to remedy the defendants' discriminatory practices; and the Adams plaintiffs contended that the district court had gone too far in its St. Louis School District reassignment plan.

hearing had been held. The Adams plaintiffs contended the district court could order the State to consolidate city and county schools if necessary to effectuate desegregation of the city schools and that these actions could be taken without additional hearings or liability findings. The City Board argued that the district court orders were not reviewable. We held that the court order adding additional parties was not appealable. We stated:

> The district court has yet to issue an order that impacts any of the county schools or units of government. Thus, we are being asked not to rule on a specific plan but to anticipate what the district court may have in mind and to instruct it as to what it can or cannot do. The most that can be said is that the district court has indicated in one or more of its orders that it may take actions which impact significantly on St. Louis County school districts.

Liddell v. Board of Educ., 677 F.2d 626, 641 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982). We remanded to the district court for action consistent with our opinion.

On August 6, 1982, the district court entered an order in which it disclosed that if it held a hearing and found that the County Districts had committed constitutional violations that contributed to the segregation of the St. Louis School District, it would order the consolidation of the city and county schools. The court scheduled interdistrict liability hearings. Before the hearings were held, however, the City Board, the Liddell plaintiffs, the Caldwell plaintiffs, and all eighteen County Districts entered into a settlement agreement that settled the plaintiffs' interdistrict claims against the eighteen County Districts. The agreement provided for voluntary interdistrict transfers between city and county schools and included fiscal incentives to be funded by the State to encourage the transfers. Each district receiving sufficient transfers within five years to satisfy its desegregation obligations

would receive a final judgment.[4] The State, having been found to be the primary constitutional violator, was ordered to fund the transfer of city students to the County Districts. We affirmed the district court in an en banc opinion and set forth our reasons in great detail. *Liddell v. Missouri* (*Liddell VII*), 731 F.2d 1294, 1301-09 (8th Cir.) (en banc), *cert. denied*, 496 U.S. 816 (1984).[5]

In *Liddell v. Board of Education*, 873 F.2d 191, 192 (8th Cir. 1989), the State appealed from a district court order "clarifying the extent of Missouri's funding obligations for interdistrict student transfers in the . . . desegregation case." It took the position that when a County District had achieved its designated plan ratio, the State was no longer required to pay for transfers. The State sought further clarification of its funding obligation. We stated:

> Missouri's obligation is to fund interdistrict transfers necessary to reach 15,000 students—no more, no less. . . . The parties agree the total number of students currently attending county schools under the interdistrict transfer program is less than 15,000. Thus, Missouri's obligation to fund interdistrict transfers has not yet been fulfilled. Insofar as the district court's order restoring state funding complies with this portion of our opinion, we affirm. Furthermore,

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[4] The settlement agreement further provided "that after a school district receives an order granting it final judgment, it has a continuing obligation to: 'cooperate in the recruitment and promotion of transfers . . . .'" *Liddell v. Board of Educ.*, 96 F.3d 1091, 1094 (8th Cir. 1996) (quoting Appellants' Jt. App. at 108).

[5] In a subsequent opinion, *Liddell v. Board of Educ.*, 851 F.2d 1104, 1105 (8th Cir. 1988), we noted that 12,000 black students were then enrolled in the County Districts. This number has remained relatively constant up to the present. The County Districts state in their current briefs that they are willing to continue to accept the voluntary transfers under the terms of the settlement agreement. Most, if not all, of the County Districts have achieved the plan ratios or goals established under the settlement agreement.

> the parties shall take whatever steps are necessary to ensure that 15,000 city students are enrolled in the county schools. In light of the parties' progress to date, this goal is attainable, and it must be achieved at the earliest opportunity.

Id. at 194. No petition for a writ of certiorari was filed. We were asked to clarify our opinion a few months later. We again stated:

> 1. Missouri is obligated to fund voluntary transfer students up to a total of 15,000, regardless of any individual county district's Plan Ratio and/or Plan Goal attainment. . . .
>
> 2. The state's obligation to fund the voluntary transfer of students will continue until such time as the state is relieved of that obligation.

Liddell v. Board of Educ., 882 F.2d 298, 299 (8th Cir. 1989). Again, no petition for a writ of certiorari was filed.

In October 1991, the State filed the first of three motions to declare the St. Louis School District unitary, terminate desegregation funding, and release all defendants from court supervision. The United States, the City Board, and the plaintiffs responded that consideration of unitary status was premature. The State did not reply to the responses. Instead, it filed a new motion on May 7, 1992, requesting partial unitary status. The district court held that while the State's request was premature, the State was entitled to answers to certain discovery requests because a future declaration of unitary status might be warranted. The State did not appeal this ruling to this court.

In November 1993, the State filed an amended motion for unitary status. It informed the court that it would be prepared to present evidence in support of its amended motion within one year. Eleven months later the State

asked the district court for a hearing date on its motion for unitary status. On February 28, 1995, the district court scheduled a hearing for September 1995. This hearing was later rescheduled for March 1996.

On January 4, 1996, while the unitary status motion was still pending, the State filed a motion to terminate the VITP on the basis of *Jenkins III*. It described its motion as conditional and not ripe for court action because it desired a ruling on its motion only if the court failed to enter a finding of unitary status following the hearing scheduled for March 1996. The City Board and the plaintiffs requested that the hearing on unitary status be postponed while the State's *Jenkins III* motion was adjudicated. The plaintiffs, joined by the United States, alternatively requested that the court appoint a settlement coordinator to resolve the litigation without the need for trial. The State again requested that the *Jenkins III* issue be addressed only after a hearing on its unitary status motion was not granted in full.

On February 15, 1996, the court denied the State's *Jenkins III* motion as not ripe. It also denied the request to postpone the hearing on unitary status and decided that the appointment of a settlement coordinator would be more beneficial after a hearing on the State's unitary status motion had been held. The court stated that:

> [It] agreed with plaintiffs that the best resolution of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools. The Court however is reluctant to continue the hearing. It may well be that the possibility for settlement will be greater following the hearing, at which time the appointment of a Settlement Coordinator would be appropriate and beneficial.

G(1939)96 at 2. The State did not appeal the order denying its *Jenkins III* motion.

In March 1996, following extensive discovery, the district court conducted a three-week unitary status hearing. Following the hearing, it appointed Dr. William H. Danforth, former Chancellor of Washington University of St. Louis, as the settlement coordinator. It gave the coordinator broad powers designed to stimulate negotiations and directed the parties and their counsel to attend all meetings scheduled by the settlement coordinator and to participate in good faith in the negotiations. It ordered "that all components of the settlement agreement now in force shall continue as they are currently operating." G(2062)96.

On June 26, 1996, the district court, responding to a motion by the State, held that settlement negotiations would be kept confidential, that the settlement coordinator should not recommend to the court how the case should be resolved, and refused to set a time limit for the parties to continue negotiations, indicating it was confident that the settlement coordinator would proceed with all diligence. G(2134)96.

On July 24, 1996, the State appealed district court orders G(2062)96 and G(2134)96, and sought a stay of the interdistrict component of the desegregation remedy pending appeal of the order appointing the settlement coordinator. It sought alternative remedies limiting its obligations under the desegregation plan. The district court denied motions for a stay pending appeal on August 14, 1996. G(2175)96. This court and Justice Thomas, as Circuit Justice, denied substantially similar motions for a stay. The State again appealed the denial of the stay motion. This court consolidated and then dismissed all pending appeals. We noted that G(2062)96 and G(2134)96 were interlocutory and related to settlement procedures and case management and could not be characterized as appeals from orders denying an injunction. We stated that "[a] district court, particularly in school desegregation cases, has broad discretion to control its docket and has the necessary flexibility to shape rem-

edies that adjust public and private needs." *Liddell v. Board of Educ.*, 105 F.3d 1208, 1212 (8th Cir. 1997). With respect to G(2175)96, we stated:

> The State argues that the district court erred because it effectively denied its motion for unitary status. We disagree. The district court *has* yet to rule on the State's unitary status motion. The district court in this case has not refused to rule on the State's motion that the St. Louis School District be declared unitary. It has simply postponed post-hearing briefing and deferred final ruling on this matter. We cannot review a matter that has not been ruled on by the district court. We lack jurisdiction over the State's claim that the district court has erroneously denied its motion for unitary status.

Id. The State filed a petition for rehearing en banc; that petition was denied on May 7, 1997. No petition for a writ of certiorari was filed.

On March 14, 1997, the State moved the district court for an order directing that all parties immediately cease efforts to recruit and admit new students into the VITP and relieve the State from any funding obligations with respect to such students. The State made the same argument in this motion as it *made* in *Liddell v. Board of Education*, 105 F.3d 1208 (8th Cir. 1997), that the VITP violates *Jenkins III*. On April 10, 1997, the district court denied the State's motion, stating that it did so for the reasons set forth by the responses of certain county districts, the United States, the Caldwell-NAACP plaintiffs, and the City Board. The State now appeals.[6]

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[6] The County Districts maintained that, while they took no position regarding when the VITP might be phased out, a sufficient amount of "lead time" would be necessary to prevent disruption to students, parents, and staff as well as to preserve the interests of sound budgetary and operational management. The United States contended that the settlement process should be permitted to run

The District Court Did Not Abuse Its Discretion in Denying the State's Motion to Phase Out the VITP

The State appeals from a district court order denying its motion for an order (1) directing that all parties and all court advisory panels immediately cease all efforts to recruit and admit new students into the VITP, and (2) relieving the State from any funding obligations as to such students. We ruled against the State on a similar question only eight months ago and held that the district court did not abuse its discretion in denying the State's request. *Liddell*, 105 F.3d at 1212. No new arguments are advanced that cause us to change our position at this time. Settlement negotiations are still ongoing. At oral argument, counsel for the State asserted that settlement negotiations have reached an impasse, but counsel for all the other parties disagreed. As all parties are bound by a district court order to maintain confidentiality and as the settlement coordinator has not yet filed a report indicating an impasse, we can only assume the settlement coordinator is making every effort to resolve the many complex issues that must be addressed.[7]

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its course and that the State's *Jenkins III* motion was not yet ripe. The Caldwell plaintiffs argued that the State had already lost its challenge to the continuation of the VITP and questioned the State's public posturing during the settlement process. They maintained that the State had made no showing that the city schools, faculty, etc. were capable of absorbing returning students if the VITP were terminated. The City Board argued that the State's motion should be denied because it undermined the settlement process, failed on the merits, and violated the mandate from *Freeman v. Pitts*, 503 U.S. 467 (1992), that requires a transition phase for the orderly withdrawal of court supervision.

[7] We note that as recently as September 10, 1997, the attorney general of the State of Missouri made public a new proposal to end the litigation. We assume the settlement director and all parties to this litigation were notified of the proposal and that this proposal, as well as others, will be considered by the parties in settlement negotiations.

It is important to bear in mind that the current school desegregation plan is based on a "unique and comprehensive settlement agreement" approved by this court sitting en banc in 1984. *Liddell*, 731 F.2d at 1297.[8] We note that all parties other than the State have indicated a willingness to continue essential elements of the plan, including the interdistrict transfer of black city students to the County Districts.

Settlement is the preferred method of resolving protracted school desegregation cases. As recently as 1990 in considering the proposed settlement of the Little Rock School District desegregation case, we stated:

> The law strongly favors settlements. Courts should hospitably receive them. This may be especially true in the present context—a protracted highly divisive, even bitter [desegregation] litigation, any lasting solution to which necessarily depends on the good faith and cooperation of all the parties, especially the defendants. As a practical matter a remedy that everyone agrees to is a lot more likely to succeed than one to which the defendants must be dragged kicking and screaming.

Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 921 F.2d 1371, 1383 (8th Cir. 1990). Consistent

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[8] This desegregation plan resulted from a settlement agreement encouraged by the Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri. In encouraging the parties to settle, he stated:

> Society's greatest opportunities lie in encouraging human inclinations toward compromise, rather than stirring our tendencies for competition and rivalry. If lawyers, educators, and public officials do not help marshall cooperation and design mechanisms that promote peaceful resolution of conflicts, we shall miss an opportunity to participate in the most creative social experiments of our time.

Liddell v. Board of Educ., 567 F. Supp. 1037, 1041 (E.D. Mo. 1983) (citation omitted).

with this court's preference, we recently approved a settlement agreement in the Kansas City School District desegregation case. *Jenkins v. Missouri*, No. 97-1968, slip op. at 35 (8th Cir. Aug. 12, 1997).[9]

Given the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying the State's motion to phase out the voluntary transfer of black city students to the County Districts pending settlement negotiations.

There can be no doubt as to the complexity of the issues that need to be resolved either by settlement or court order. For example, over the course of several years, approximately 12,000 black city students per year have voluntarily transferred from city schools to county schools. Ending or phasing out this program will inevitably lead to a significant increase in the black population of the St. Louis School District and may well result in the resegregation of the St. Louis schools through something other than a change in demographic factors. Moreover, the desegregation plan involves remedial programs, magnet schools, student assignments, teacher exchanges, and other programs designed to give students of all races an equal opportunity for a quality, integrated education, each of

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[9] The general principle that the law favors settlement agreements has been recognized for over 100 years. *See Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) (compromises of disputed claims are favored by the courts) (citing *Hennessy v. Bacon*, 137 U.S. 78 (1890)). This principle is recognized in desegregation cases. *Armstrong v. Board of Sch. Dirs.*, 616 F.2d 305, 313 (7th Cir. 1980)); *Jones v. Caddo Parish Sch. Bd.*, 704 F.2d 206, 221 (5th Cir. 1983). *See also* Daniel J. McMullen and Irene Hirata McMullen, *Stubborn Facts of History—The Vestiges of Past Discrimination in School Desegregation Cases*, 44 Case W. Res. L. Rev. 75 (1993)).

which must be independently considered pursuant to *Green v. New Kent County School Board*, 391 U.S. 430 (1968), and *Freeman v. Pitts*, 503 U.S. 467 (1992). From the beginning, the plan has relied on state and city funding. All elements of the plan have been repeatedly subject to district and circuit court review, many of which became the subject of petitions for writs of certiorari to the United States Supreme Court. *See* note 1, *supra*. Under these circumstances, we do not believe that the district court abused its discretion in refusing the State's request to enjoin the parties and panels from immediately ceasing all efforts to recruit and admit new students into the VITP and relieve the State from any funding obligations as to such students pending settlement negotiations.

The Unitary Status Motion

In the event the district court determines that an impasse in the settlement negotiations has been reached, it must then decide the State's pending motion to have the St. Louis School District declared unitary and determine the consequences that flow from that decision. In reaching these decisions, the district court shall be guided by the Supreme Court's decisions in *Freeman*, *Dowell v. Board of Education of Oklahoma City Public Schools*, 498 U.S. 237 (1991), and *Green*.

It is clear from these decisions, particularly *Freeman* and *Dowell*, that the Supreme Court requires that once a school district has achieved unitary status, a district court should not deny that status to a school district because of demographic factors or changes since the desegregation plan was initiated. The Court made clear in *Dowell* that on obtaining unitary status, the defendant school district would not return to its former ways.[10]

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[10] The Court stated that:

> In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compli-

Herein lies the problem. The historical record reveals that significant progress has been made in providing equal opportunities through the programs that have been in effect for several years. As previously noted, if some or all of these programs are ended by a declaration that the St. Louis School District has achieved unitary status, then the immediate effect will most probably be a significant resegregation of the city schools. The inescapable result would be that approximately 12,000 black students would be reassigned to the city schools, thereby increasing the degree of segregation in those schools. Unlike the situation in *Freeman* and *Dowell*, the resegregation would not result from changed demographic factors. Moreover, segregation may very well be increased in the city schools if the magnet or remedial programs are either eliminated or limited in scope and the students are reassigned on the basis of neighborhood schools rather than on the current basis, which is designed to secure the maximum desegregation practicable.[11] We do not say and are not prepared to say at this time how the mandate of the Supreme Court, particularly in *Dowell* that resegregation should not result from a declaration of unitary status, can be achieved; but the issue is one that must be dealt with either in settlement negotiations or by district court order.

The State does not dispute the fact that ending the voluntary interdistrict transfer of black city students to

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> ance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the Board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of 'grievous wrong evoked by new and unforseen conditions' is required of the Board.

Dowell, 498 U.S. at 247.

[11] It may well be, as *Freeman* points out, that some elements of the program are unitary and will remain so if that status is declared. The Supreme Court states that each element is to be treated independently. *Freeman*, 503 U.S. at 489.

the County Districts and limiting its other responsibilities will probably result in some resegregation of the city schools. Nor does it dispute that black students in St. Louis were either denied an education or limited to attending segregated schools for at least 140 years, resulting in savings to the St. Louis School District and the State. *See Adams v. United States*, 620 F.2d 1277 (8th Cir. 1980). Rather than address these issues, the State argues that it has expended large sums of money in the twenty years that this program has been in effect, it has done its share, and the time has come to end its responsibilities in the matter. In support of ending its obligations, the State points to the fact that it has initiated a number of programs that have particular benefit to disadvantaged city students [12] and has publicly proposed to settle its obligations by making a lump sum payment to the St. Louis School District.

The district court must take all of these factors into consideration in determining whether to grant full or partial unitary status and what the defendants' continuing obligations will be if such status is granted. We will not prejudge that matter or issue an advisory opinion. We merely repeat that the complexity of the issues involved support the view heretofore expressed that the best way to resolve these problems and provide a quality, integrated education to all city students is through good-faith settlement negotiations.

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[12] These programs include a comprehensive school improvement program, reading intervention programs, drug-free schools program, emphasis on early childhood education, early childhood programs, AIDS awareness education, unwed mothers' education, gun-free schools, provision of medical services to Medicaid-eligible school children, and Missouri's nationally-renowned "Parents as Teachers" program. *See* Mo. Rev. Stat. §§ 162.300; 167.268, .270, .294, .606; 191.668; 195.214; 571.030.

The *Jenkins III* Issue

The State's principal argument is that the district court is without discretion in this matter and that *Jenkins III* requires that the VITP be phased out now. We do not agree that *Jenkins III* requires this result. A premise of *Jenkins III* was that the trial court specifically found that no interdistrict violation had taken place. No such determination has been made here.[13] To the contrary, from the beginning the plaintiffs asserted interdistrict violations. Rather than contest these allegations, the County Districts entered into a settlement agreement under which they agreed to accept a significant number of transfer students and in return were promised judgments relieving them from any possible constitutional violations. Under these circumstances, it would be wholly inappropriate for this court to make an initial determination with respect to an interdistrict violation.

Making such a determination would invade the province of the district court and would be unfair to the parties by denying them the opportunity, should it become necessary, to litigate the interdistrict violation issue. To require the County Districts to litigate this issue now, after voluntarily accepting thousands of city transfer students for twenty years, would violate their fundamental right to due process. The plaintiffs would be equally deprived if they were denied the opportunity to prove interdistrict violations. Moreover, the fundamental and undisputed fact remains that the State has been found to be the primary constitutional violator, and this court has consistently held in panel and in en banc opinions that the State could be re-

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[13] Justice O'Connor stated in *Jenkins III* in discussing the Kansas City School District, "Neither the legal responsibility for nor the causal effects of . . . racial segregation transgressed its boundaries, and absent such interdistrict violation or segregative effects, *Milliken* and *Gatreaux* do not permit a regional remedial plan." *Jenkins III*, 115 S. Ct. at 2059 (O'Connor, J., concurring).

quired to fund the VITP. *See* note 1, *supra*. Even if it were appropriate for us to address that issue today, however, this court could not make a proper determination without a complete record. In order to apprehend fully the constitutional violations as they existed many years ago, we must employ something more rigorous than hindsight, guesswork, and speculation.

In *Jenkins III*, Chief Justice Rehnquist, speaking for the Court, stated that the Kansas City desegregation plan was grounded in "improving the desegregative attractiveness of the" Kansas City, Missouri School District (KCMSD). *Jenkins III*, 115 S. Ct. at 2050. Here, neither "desegregative attractiveness" nor "suburban comparability" were the basis of the settlement agreement of the district court's or this court's approval of the settlement plan. Rather, the plan was premised on the fact that both the State and the County Districts opposed consolidation of the city and county districts and a voluntary transfer plan could and would be an integral factor in desegregating the city schools. Everyone but the State agreed to this solution, and it offered no alternative designed to secure the black city students an opportunity for an equal education. The premise has proven valid, and the St. Louis schools have achieved a high degree of integration.

We also note that Justice O'Connor, who concurred in the plurality opinion in *Jenkins III*, stated that the district court found "that the segregative effects of KCMSD's constitutional violation did not transcend its geographical boundaries." *Jenkins III*, *id.* at 2060. As previously noted, there has been no such finding in this case. Indeed, the parties are still at odds as to whether interdistrict violations occurred; and rather than have this argument resolved after lengthy litigation, the plaintiffs, the City Board, the County Districts, and the United States agreed to the VITP. Justice O'Connor also noted the limited nature of the *Jenkins III* decision and remand, stating that "[t]he Court today discusses desegregative attractiveness

only insofar as it supports the salary increase order under review, . . . and properly refrains from addressing the propriety of all the remedies that the District Court has ordered, revised, and extended in the 18-year history of this case." *Id.* at 2061.[14]

There is, of course, language in the majority opinion in *Jenkins III* suggesting that no interdistrict relief can be granted unless an interdistrict violation or segregative effects have been proved. This language must be tempered by the facts in *Jenkins III* and limited nature of the actual holdings. In our view, the question remains sufficiently open to permit us to follow our numerous precedents and hold that *Jenkins III* does not require us to hold that the VITP must be terminated or phased out at this time.

Conclusion

We affirm the order of the district court denying the State's motion to end all efforts to recruit and admit new students into the VITP for the 1997-98 school year. The district court did not abuse its discretion in denying the State's motion to phase out the voluntary transfer of black city students to the County Districts pending settlement negotiations. Its decision to do so was not contrary to the Supreme Court's decision in *Jenkins III*. We renew our encouragement to the parties to make every effort to resolve this matter so that students of all races will have a continuing equal opportunity for a quality, integrated education. In the unfortunate event that the negotiations

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[14] The district court determined that the KCMSD had attained unitariness in only one of the five aspects enumerated in *Green*, 391 U.S. at 435. *Jenkins v. Missouri*, No. 77-0420-CV-W-RGC, slip op. at 28-37, 59 (W.D. Mo. Mar. 25, 1997). We affirmed the district court's order. *Jenkins v. Missouri*, No. 97-1968, slip op. (8th Cir. Aug. 12, 1997).

reach an impasse, the district court should promptly rule on the pending unitary status motion.

A true copy.

Attest.

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

[Filed Apr. 10, 1997]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-0100C(6)
G(2391)97

CRATON LIDDELL, *et al.*,
Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE CITY OF ST. LOUIS, MISSOURI, *et al.*,
Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on the State of Missouri's motion G(2338)97 to modify the Court's injunctions relating to the Voluntary Interdistrict Transfer Plan (VITP). The State seeks an order that all efforts to recruit and admit new students into the VITP cease and that no new students be enrolled in the program for the 1997-98 school year. Responses have been filed by certain county districts, G(2363)97; the United States G(2365)97; the Caldwell-NAACP plaintiffs, G(2370)97; and City Board, G(2371)97.

For the reasons set forth in these responses, the Court believes the motion should be denied.

Accordingly,

IT IS HEREBY ORDERED that the State of Missouri's motion G(2338)97 to modify is denied.

Dated this 10th day of April, 1997.

/s/ George F. Gunn, Jr.
GEORGE F. GUNN, JR.
United States District Judge

COURT-ORDERED EXPENDITURES BY STATE OF MISSOURI FOR ST. LOUIS VOLUNTARY INTERDISTRICT TRANSFER PROGRAM

Fiscal Year	County Tuition Incentives	City Tuition Incentives	County Home District Incentives (Phantom Payments)	City Homes District Incentives (Phantom Payments)	Interdistrict Transportation	County Capital	Voluntary Interdistrict Coordinating Committee (VICC)	Staff Exchange Program	TOTAL
1982 [1]	–	–	0	0	–	0	0	0	**157,327**
1983	2,133,252 [2]	–	0	0	2,264,910	0	0	0	**4,398,164**
1984	5,811,925	34,295	0	0	3,856,385	0	293,718	0	**9,996,322**
1985	13,839,011	956,948	296,189	0	7,524,184	125,000	394,015	0	**23,135,347**
1986	19,568,969	851,675	218,945	4,268,048	10,241,477	100,000	356,515	42,500	**35,648,129**
1987	26,915,088	1,242,977	272,145	6,637,709	18,303,692	208,783	779,321	17,500	**54,377,215**
1988	35,500,340	1,009,659	312,518	9,797,530	19,735,486	258,517	806,597	12,500	**67,433,146**
1989	36,614,643	1,643,357	347,962	12,207,340	20,962,920	2,481,781	865,086	5,000	**75,128,088**
1990	40,762,400	699,150	395,816	12,822,423	20,718,947	767,583	867,991	18,000	**77,052,310**
1991	48,451,788	1,988,963	371,667	13,441,603	22,467,457	6,681,125	1,032,117	9,000	**94,443,720**
1992	54,481,465	2,286,231	407,681	11,607,388	23,150,239	7,360,461	1,099,500	4,500	**100,397,465**
1993	53,791,830	1,638,372	425,925	14,565,053	25,005,097	9,618,314	1,121,091	13,500	**106,179,181**
1994	57,673,456	2,040,595	544,657	15,477,195	26,657,003	5,795,901	1,176,032	0	**109,364,839**
1995	58,448,050	2,350,475	723,499	14,270,284	26,997,455	2,631,630	1,181,927	0	**106,603,320**
1996	61,474,917	2,939,525	0 [4]	0 [4]	27,715,462	1,149,680	922,900	0	**94,202,492**
1997	57,723,257	3,261,361	0 [4]	0 [4]	27,564,850	(588,229)	1,228,372	0	**89,189,619**
1998 [3]	0	0	0 [4]	0 [4]	4,164,973	0	688,507	0	**4,853,488**
Totals	**573,190,391**	**22,943,583**	**4,317,005**	**115,094,571**	**287,330,537**	**36,590,545**	**12,813,687**	**122,500**	**1,052,560,172**

NOTES

1. Payments for tuition incentives (not able to distinguish between county and city) and transportation.
2. Information not available to distinguish between county and city tuition incentives.
3. Payments as of October 21, 1997.
4. Home district incentive calculations are not completed for FY 96 and data is not yet available for FY97 or FY98.

APPENDIX D

TOTAL FUNDING OF DESEGREGATION MEASURES BY THE STATE

[Clerk U.S. District Court
Exhibit: D State 11A
Case No. 72-100 C(6)]

Fiscal Year	Magnet Plan	Quality Education Plan	Part-Time Programs	VIDT Funding	Capital Funding	Intradistrict Plan	Committee/ Misc.	Totals
1981	0	0	0		0	8,530,000	0	8,530,000
1982	0	0	0	157,327	0	8,624,435	0	8,781,762
1983	0	0	0	4,398,164	0	8,130,269	502,940	13,031,372
1984	0	10,625,443	0	9,996,322	0	8,374,806	769,741	29,766,312
1985	0	19,265,882	0	23,135,347	0	8,493,517	504,013	51,398,760
1986	0	10,733,330	9,312,171	35,648,129	0	8,869,793	494,228	65,057,652
1987	0	11,800,842	10,337,651	54,377,215	0	9,361,843	1,349,597	87,227,149
1988	0	11,075,496	11,380,605	67,433,146	1,299,754	9,812,838	1,186,806	102,188,645
1989	0	12,505,937	11,934,270	75,128,088	18,850,890	9,731,791	1,315,819	129,466,795
1990	11,032,089	11,856,898	1,274,844	77,052,310	20,278,927	6,007,519	964,270	128,466,857
1991	13,584,702	10,177,819	1,418,135	94,443,180	20,181,189	6,044,459	632,983	146,482,466
1992	14,001,455	10,305,936	1,511,332	100,397,465	16,934,659	5,973,182	581,244	149,705,278
1993	18,072,252	10,084,813	1,542,141	106,179,181	9,855,247	5,512,102	587,202	151,832,938
1994	19,951,150	10,212,098	1,542,519	109,364,839	4,704,543	5,750,909	483,383	152,009,441
1995	23,580,184	10,492,006	1,597,777	106,603,320	6,995,932	5,751,321	607,672	155,628,213
1996	0	0	0	42,217,947	1,572,950	0	452,704	44,243,602
TOTALS	100,221,832	139,136,500	51,851,445	906,531,981	100,674,091	114,968,784	10,432,602	1,423,817,235

1. 1996 payments through February, 1996. St. Louis expenditures does not include magnet capital.
2. St. Louis expenditures obtained from annual auditor's report.
3. Prior to 1990, magnet costs were paid under the Quality Education and Intradistrict Funds.
4. VICC and county capital expenditures included in VIDT column.
5. Miscellaneous costs generally includes desegregation auditor fees.

SETTLEMENT PLAN EXPENDITURES
QUALITY EDUCATION PROGRAMS
(50% State Funding)

Fiscal Year	State Deseg. Expenditures	SLPS Expenditures	Total Expenditures
1984	10,625,443	10,625,443	21,250,886
1985	19,265,882	19,265,881	38,531,763
1986	10,733,330	10,733,329	21,466,659
1987	11,800,842	11,800,841	23,601,683
1988	11,075,496	11,075,495	22,150,991
1989	12,505,937	12,505,936	25,011,873
1990	11,856,898	11,856,898	23,713,796
1991	10,177,819	10,177,818	20,355,637
1992	10,305,936	10,305,936	20,611,872
1993	10,084,813	10,084,813	20,169,626
1994	10,212,098	10,212,098	20,424,196
1995	10,492,006	10,492,005	20,984,011
TOTAL	139,136,500	139,136,493	278,272,993

1. Funding totals were taken from SLPS' Annual Financial and Compliance Audits for the Settlement Plan—Quality Education Programs. Fiscal year 1984 and 1985 audits are listed as Metropolitan Desegregation Settlement Plan. Thus, Quality Education Programs (50% State funding) and Part-Time Programs (100% State funding) were reported together. There is not enough information to break out separate funding for the purposes of this summary chart.
2. Totals reflect expenditures and encumbrances.
3. Fund 34 provides for the costs associated with the Settlement Plan—Quality Education Programs.

[Clerk U.S. District Court
Exhibits: D State 13
Case No. 72-100 C(6)]

SETTLEMENT PLAN EXPENDITURES
PART-TIME PROGRAMS
(100% State Funding)

Fiscal Year	State Expenditures	SLPS Expenditures	Total Expenditures
1986	9,312,171	0	9,312,171
1987	10,337,651	0	10,337,651
1988	11,380,605	0	11,380,605
1989	11,934,270	0	11,934,270
1990	1,274,844	0	1,274,844
1991	1,418,135	0	1,418,135
1992	1,511,332	0	1,511,332
1993	1,542,141	0	1,542,141
1994	1,542,519	0	1,542,519
1995	1,597,777	0	1,597,777
TOTAL	51,851,445	0	51,851,445

1. Funding totals were taken from SLPS' Annual Financial and Compliance Audits for the Part-Time Integrative and Magnet School Programs and the Part-Time Integrative Program beginning in Fiscal Year 1990.

2. Prior to 1990, Part-time programs also included the Interdistrict Magnets (100%). With L(2090)88 all magnet schools were funded by the Unified Funding Formula, leaving only part-time programs in place.

3. Totals reflect full court-ordered expenditures and eligible encumbrances (amended).

4. Fund 53—This fund is for the costs associated with the Settlement Plan Part-Time Programs with the St. Louis Public Schools.

INTRADISTRICT PLAN EXPENDITURES
Funds 44, 57 and 59
(50% State Funding)

Fiscal Year	State Expenditures	SLPS Expenditures	Total Expenditures
1981	8,530,000	8,603,451	17,133,451
1982	8,624,435	8,607,934	17,232,369
1983	8,130,269	8,130,268	16,260,537
1984	8,374,806	8,374,806	16,749,612
1985	8,493,517	8,493,517	16,987,034
1986	8,869,793	8,869,792	17,739,585
1987	9,361,843	9,361,843	18,723,686
1988	9,812,838	9,812,838	19,625,676
1989	9,731,791	9,731,791	19,463,582
1990	6,007,519	6,007,519	12,015,038
1991	6,044,459	6,044,459	12,088,918
1992	5,973,182	5,973,181	11,946,363
1993	5,512,102	5,512,101	11,024,203
1994	5,750,909	5,750,909	11,501,818
1995	5,751,321	5,751,320	11,502,641
TOTALS	114,968,784	115,025,729	229,994,513

1. Funding totals were taken from the State Auditor's Reports (FY1981 and FY1982) and SLPS' Annual Financial and Compliance Audits (FY1983 to current) for the Intradistrict Plan.
2. Totals reflect full court-ordered expenditures and eligible encumbrances (amended).
3. The Intradistrict Plan consists of Fund 44 Mini-Grant, Fund 57 Intracity Plan and Fund 59 Chapter II. The funding is for special programs and staffing for non-integrated and integrated schools.

Supreme Court, U.S.
FILED
JAN 27 1998
CLERK

(2)

No. 97-888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

MICHAEL C. LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTION PRESENTED

Whether the court of appeals correctly ruled that the Honorable District Judge George F. Gunn did not abuse his discretion when he refused to modify a complex desegregation remedy until the completion of court-ordered settlement efforts designed to end federal court supervision.

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FEDERAL CASES

Adams v. United States, 620 F.2d 1277 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980) 7,8,9

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Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980) 20

Board of Education v. Dowell, 498 U.S. 237 (1991) 11

Brockington v. Rhodes, 396 U.S. 41 (1969) 22

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Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177 (4th Cir. 1993) 20

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Conservation Law Foundation v. Franklin, 989 F.2d 54 (1st Cir. 1993) 20

DeFunis v. Odegaard, 416 U.S. 312 (1974) 22

Freeman v. Pitts, 505 U.S. 467 (1992) 10,19

Hall v. Beals, 396 U.S. 45 (1969) 22

Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165 (1989) 19

In re Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996) 19,20

In re General Motors Corp., 55 F.3d 768 (3rd Cir.), *cert. denied*, 116 S. Ct. 88 (1995) 20

Jones v. Caddo Parish School Bd., 704 F.2d 206 (5th Cir. 1983) 20

Landis v. North American Co., 299 U.S. 248 (1936) 19

Liddell v. Board of Education, 105 F.3d 1208 (8th Cir. 1997) 14

Liddell v. Board of Education, 839 F.2d 400 (8th Cir.), *cert. denied*, 488 U.S. 825 (1988) 8

Liddell v. State of Missouri, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) 6,8,9

Liddell v. Board of Education, 677 F.2d 626 (8th Cir), *cert. denied*, 459 U.S. 877 (1980) 8,9

Liddell v. Board of Education, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981) 8,9

Liddell v. Board of Education, 567 F. Supp. 1037 (E.D. Mo. 1983) 8

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Liddell v. Board of Education, 469 F. Supp. 1304 (E.D. Mo. 1979) 7,9

Milliken v. Bradley, 433 U.S. 267 (1977) 19

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Williams v. First National Bank, 216 U.S. 582 (1910) 19

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of the City of St. Louis (the "Board") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit. That opinion is reported at 126 F.3d 1049 (1997).

STATEMENT OF THE CASE

The district court in this complex school desegregation case has put in place a settlement process designed to end federal court supervision of the St. Louis Public Schools ("SLPS") and to restore local control. Pending the outcome of the settlement efforts, the district court ordered that all components of the remedy would, for the time, remain in place. In the opinion now the subject of the State of Missouri's petition, the Eighth Circuit ruled that the district court acted within its discretion in continuing all components of the remedy pending these settlement efforts. In doing so, the Eighth Circuit recognized that the settlement process was entirely appropriate in view of the complex issues involved in preparing a plan for withdrawing supervision, the value of settlements generally, and the potential for extensive litigation in the future should settlement efforts fail.

District Court Judge George F. Gunn, appointed to the bench by President Ronald W. Reagan, implemented the settlement process based upon his belief that "the best conclusion of this case would be an agreed-upon plan for ending court supervision of the St. Louis Public Schools. . . ." As part of this plan, he appointed a settlement coordinator, Dr. William H. Danforth, former Chancellor of Washington University in St. Louis, who is charged with the authority and responsibility to oversee and stimulate settlement negotiations between the parties.

This process is moving forward. The parties have met with the settlement coordinator, exchanged settlement proposals, both publicly and privately, and the elected representatives of the people of the State of Missouri (the "State") have formed a legislative committee to consider issues under negotiation. (Ironically, the committee has proposed to legislate the continuation for ten more years of the interdistrict transfer program that the Attorney General here seeks to terminate.) Relevant legislation will be introduced in the Missouri General Assembly shortly, and several of the key parties have reached agreement on some issues.

Rather than devote full attention to the settlement process, however, the State has chosen to file a petition for certiorari that distorts the procedural history of the case as well as the opinion of the court of appeals. The petition is riddled with factual inaccuracies and raises issues irrelevant to the issue actually decided by the court of appeals.

The *Milliken I* and *Jenkins III* issues that the State Defendants attempt to raise were not decided by the court of appeals. The court of appeals merely held that until negotiations are complete, the district court was within its discretion in temporarily maintaining the remedy. This holding is based upon fundamental and universally accepted principles of law regarding the value of settlements and the district court's authority to manage litigation. The court of appeals' decision does not require this Court's intervention.

Background

a. *Current Status.* Following a three week evidentiary hearing before the district court on a State motion for unitary status, District Judge George F. Gunn issued an order stating his belief that "the best conclusion of this case would be an agreed upon plan for ending court supervision of the St. Louis Public Schools." *Liddell v. Board of Educ.*, No. 72-100, Order G(2062)96, (E.D. Mo. Apr. 23, 1996). Judge Gunn concluded

that "a serious settlement effort, under the direction of a Settlement Coordinator, should be undertaken." He therefore appointed Dr. William H. Danforth to serve as the coordinator. Judge Gunn also ordered the parties to participate in good faith negotiations and stayed the post-hearing briefing schedule. Finally, he ordered that all components of the remedy then in force would, for the time, remain in effect. *Id.*

In response to a State motion to alter or amend the order appointing Dr. Danforth, the district court ruled that the negotiations would be kept confidential from the court and outside parties and also clarified that it was not the court's intention to have the Settlement Coordinator make recommendations to the court as to how the case should be resolved. *Liddell v. Board of Educ.*, No. 72-100, Order G(2134)96, (E.D. Mo. June 26, 1996). Judge Gunn further stated: "The Court is confident that the Settlement Coordinator will proceed with all due diligence." *Id.*

In the time since the district court appointed Dr. Danforth as settlement coordinator and set forth the settlement procedures, the State has made fourteen unsuccessful attempts to collaterally attack the settlement process.[1] These efforts have caused the

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[1] *See* State's Mot. to Alter or Amend, *Liddell v. Board of Educ.*, No. 72-100, G(2066)96, (E.D. Mo. Apr. 30, 1996); State's Notice of Appeal of Mot. to Alter or Amend. *Liddell v. Board of Educ.*, No. 72-100, G(2151A)96, (E.D. Mo. July 24, 1996); State's Mot. for Stay Pending Appeal, *Liddell v. Board of Educ.*, No. 72-100, G(2149)96, (E.D. Mo. July 24, 1996); State's Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal Nos. 96-2994/3630 (8th Cir. Aug. 15, 1996); State's Application to the United States Supreme Court For Stay Pending Appeal, *Missouri v. Liddell*, Applic. No. A-155 (Aug. 28, 1996); State's Notice of Appeal of Mot. For Stay, *Liddell v. Board of Educ.*, No. 72-100, G(2209)96, (E.D. Mo. Oct. 1, 1996); State's Pet. For Reh'g En Banc, *Liddell v. Missouri*, (Appeal Nos. 96-2994/3630) (8th Cir. Mar. 5, 1997); State's Mot. to Modify, *Liddell v. Board of Educ.*, No. 72-100, G(2338)97, (E.D. Mo. Mar. 14, 1997); State's Notice of Appeal of Mot. to Modify, *Liddell v. Board of Educ.*, No. 72-100, G(2396)97, (E.D. Mo. Apr.

(Footnote 1 continued on next page)

parties to file hundreds of pleadings and briefs and have consumed enormous amounts of time and resources. All the while, the State has complained that the settlement process is moving too slowly.

Despite the State's efforts to attack the settlement process led by Dr. Danforth, that effort is moving forward. Although the settlement process is governed by the district court's order of confidentiality, it is of public record that the settlement coordinator has regularly met with the parties to assess their needs and positions, that the parties have exchanged settlement proposals and counter proposals, and that agreement on some issues has been reached between key parties. Moreover, as recently as September, the Missouri Attorney General called a press conference on the steps of Vashon High School in the SLPS and, despite the order of confidentiality, announced a settlement proposal. *See* Colleen Carroll, *Nixon Proposes Plan to End Busing*, St. Louis Post-Dispatch, Sept. 11, 1997, at 1B.

In addition, the elected representatives of the people of the State of Missouri have formed the "Joint Interim Committee on School Desegregation and Finance" (the "Desegregation Committee") for the specific purpose of analyzing desegregation issues and preparing recommendations and legislation that address or partially address issues under negotiation. *See* Nordeka English, *Sen. House Looking Forward to School Panel Work*, St.

(Footnote 1 continued)

15, 1997); State's Mot. for Expedited Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 15, 1997); State's Mot. to Suspend Inj. Pending Appeal, *Liddell v. Board of Educ.*, No. 72-100, G(2394)97, (E.D. Mo. Apr. 11, 1997); State's Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 21, 1997); State's Pet. For Recons. En Banc of Mot. for Stay Pending Appeal, *Liddell v. Missouri*, Appeal No. 97-2009 (8th Cir. Apr. 30, 1997); State's Application to the United States Supreme Court for Stay Pending Appeal, *Missouri v. Liddell*, Applic. No. A-861 (May 28, 1997).

Louis Post-Dispatch, July 31, 1997, at 2. The Desegregation Committee has held hearings, including one in October at Roosevelt High School in the SLPS, and received evidence and testimony from the Board Members and Superintendent of the SLPS, legal counsel for the Plaintiffs in this case, the Settlement Coordinator, and the public at large. *See* Colleen Carroll, *Emotions Run High at Desegregation Talks, More Than 100 Attend Hearing on Public Schools*, St. Louis Post-Dispatch, Oct. 8, 1997, at 1A. On Monday, December 15, 1997, the Desegregation Committee issued its final report, which contained many recommendations to address desegregation issues in St. Louis. Among the recommendations in the final report is one that calls for legislation continuing the interdistrict aspects of the desegregation remedy at issue here as the choice of Missouri's citizens for at least ten more years. *See* Dale Singer, *Panel Urges Ten More Years for Desegregation*, St. Louis Post-Dispatch, Dec. 16, 1997, at A1. In the coming weeks, the Committee's proposal will come before the Missouri General Assembly and will be subject to the State's democratic legislative process.[2]

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[2] The State's assertion that the settlement process is at an impasse does not withstand even cursory scrutiny. The State has made a series of false statements and misrepresentations regarding the progress of settlement efforts. Contrary to the State's representation that the settlement coordinator has initiated only "a handful of meetings over 19 months," in fact there have been dozens of meetings, many more conference calls and numerous other productive settlement activities. The State's allegation that the Board has conditioned settlement on enactment of a State statute locking in a per-pupil expenditure of $9,500 per pupil is also unfounded. The State's Desegregation Committee specifically asked the Board to present testimony and evidence regarding the capital and funding needs of the District. The Board's cooperation in the legislative process is now being taunted by the State as an unreasonable settlement demand. In any case, the State's complaints that the settlement proposals of the parties are "patently unreasonable" are inapposite to the question of whether an impasse exists. The parties viewed the State's public proposal in September as patently inadequate, but they did not declare an impasse in the settlement process. The precise nature and process of

(Footnote 2 continued on next page)

These settlement efforts are the culmination of a seventeen-year effort to remedy the effects of more than 200 years of laws in Missouri that either prohibited the education of black children entirely or subjected black students to an inadequate education in segregated, inferior schools.

b. *A Long History of Discrimination.* The State of Missouri's presence in public education is immense, and the State's Constitution and statutes mandated discrimination against black St. Louis students on the broadest basis possible. *Liddell v. Missouri*, 731 F.2d 1294, 1306 (8th Cir. 1984) ("*Liddell VII*"). Noting the breadth, gravity and duration of the State's violation, the courts found that the constitutional violation committed by the State scarred every student in St. Louis for over five generations and gained legitimacy through the State Constitution and through the State's preeminent role in education. *Id.* at 1308.

The court below described the segregative conditions under the State educational system as follows:

> Under the state-mandated segregated system, white students were generally assigned to schools in their neighborhoods. Black students attended black schools in the "core" of the city. Those black students residing outside the "core" were bused into the black schools; for them there were no

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(Footnote 2 continued)

settlement negotiations dictates that parties may make demands with which opposing parties disagree. Hopefully, a mutually agreeable arrangement is ultimately reached. Finally, the fact that the settlement process has required more time than would be required to resolve a case among two private litigants is understandable. As the State points out, this case has been litigated for many years and involves dozens of parties implementing a complex, multi-faceted remedy in one of the nation's larger metropolitan areas. The settlement effort to resolve this case has involved officials at the highest levels of state and local government, including legislative efforts in 1997 and proposed legislation in 1998. It has also involved assessing and evaluating the needs and positions of many political subdivisions.

> neighborhood schools. Separate overlapping attendance zones were maintained for black and white students. Black students from some suburban St. Louis County school districts were also bused into the City's black schools because state law and practice prohibited them from attending their local schools.

Adams v. United States, 620 F.2d 1277, 1281 (8th Cir. 1980) (*en banc*) ("*Adams*").

In *Liddell v. Board of Education*, 491 F.Supp. 351 (E.D. Mo. 1980), the district court found that the State had compelled school segregation through its constitution, statutory law, practice and policy.[3] *Id.* at 359. The court held that the State "abdicated [its] affirmative duty. . . to obliterate all vestiges of such State imposed segregation" and concluded: "In sum, the State Defendants stand before the Court as primary constitutional wrongdoers who have abdicated their affirmative remedial duty." *Id.* Therefore, the court held the State and the Board of Education "liable for the de jure segregation which existed in the St. Louis Public Schools." *Id.* at 357. The district court found that since "[t]he primary responsibility for insuring a constitutional structure of public education is the state's, . . . it is appropriate for the Court to order the state to affirmatively participate in remedial efforts." *Id.* at 360 (quoting *United States v. Missouri*, 363 F.Supp. 739, 749 (E.D. Mo. 1973), *aff'd in relevant part*, 515 F.2d 1365 (8th Cir. 1975), *cert. denied*, 423 U.S. 951 (1975)). Noting that "affirmative participation" could include the provision of funding, the court approved implementation of a remedial plan to redress the constitutional violation.

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[3] The district court initially determined that there was no constitutional violation by any of the defendants. *Liddell v. Board of Educ.*, 469 F.Supp. 1304 (E.D. Mo. 1979). That decision was reversed by the Eighth Circuit, and the case was remanded to the district court with instructions to take the steps necessary to remedy the constitutional violation. *See Adams*, 620 F.2d at 1295.

Id. at 360. The Eighth Circuit affirmed the district court's ruling. *Liddell v. Board of Educ.*, 667 F.2d 643 (8th Cir. 1981). This Court refused to review that decision.[4] 454 U.S. 1081 (1981).

In 1981, the Board of Education and the Plaintiffs filed an interdistrict complaint against the State Defendants, school districts in St. Louis, Jefferson and St. Charles Counties, and State, City and County housing authorities noting, *inter alia*, that black students from those districts had been bused into the SLPS for many years to further segregation. In 1983, after the litigation was stayed as to Jefferson and St. Charles Counties and the housing defendants, all twenty-three of the St. Louis County school districts agreed to settle the interdistrict claims against them by voluntarily accepting City children into their schools. This agreement is referred to as the Voluntary Interdistrict Transfer Plan ("VIDT"). The district court ordered the State to fund the VIDT, and the court of appeals affirmed the district court's order. *Liddell v. Board of Educ.*, 567 F.Supp. 1037 (E.D. Mo. 1983), *aff'd*, 731 F.2d 1294 (8th Cir. 1984). In doing so, the Eighth Circuit explained that the State could be ordered to fund the VIDT because of the scope and severity of its segregative acts. The Eighth Circuit noted that under the State's system, "the State bused suburban black students from St. Louis County into the City's black schools to maintain the dual system."[5] *Liddell*

[4] The Court has refused to review this case on five separate occasions. *Liddell v. Board of Educ.*, 839 F.2d 400 (8th Cir.), *cert. denied*, 488 U.S. 825 (1988); *Liddell v. Board of Educ.*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); *Liddell v. Board of Educ.*, 677 F.2d 626 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Educ.*, 667 F.2d 643 (8th Cir.) *cert. denied*, 454 U.S. 1081 (1981); *Adams v. United States*, 620 F.2d 1277 (8th Cir.), *cert. denied*, 499 U.S. 826 (1980).

[5] The State's assertion that "the *only* finding of liability made by the courts below was intradistrict in nature" is patently untrue. Pet. at 2. It is well established that the State committed an interdistrict constitutional violation

(Footnote 5 continued on next page)

VII, 731 F.2d at 1306. The court concluded that the voluntary transfer program and other remedial components were consistent with the scope of the State's violation:

> It is clear from the foregoing that the State's presence in public education is immense and that the State's constitution and statutes mandated discrimination against black St. Louis students on the broadest possible basis. . . . Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally comprehensive remedy.

Id. This Court refused to review that decision. 469 U.S. 816 (1984).

c. *The State's Motions for Unitary Status, Its Motion for Relief Under Jenkins III and the Settlement Effort.* Since 1991, the State has filed a series of motions asking the district court to

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(Footnote 5 continued)

by creating and maintaining separate City and County vocational schools to further the dual system. *Liddell*, 677 F.2d at 632, 636; *Liddell*, 667 F.2d at 651; *Liddell*, 491 F.Supp. at 358. Moreover, contrary to the State's repeated assertion that there is no interdistrict aspect to this case, there are findings regarding significant interdistrict segregative acts and effects committed by the State in the St. Louis area. It is of record that "the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system" and that the State committed other segregative acts that contributed to interdistrict segregation. *See, e.g., Liddell VII*, 731 F.2d at 1306; *Liddell v. Board of Educ.*, 677 F.2d at 632; *Liddell v. Board of Educ.*, 667 F.2d at 651; *Adams*, 620 F.2d at 1280; *Liddell v. Board of Educ.*, 491 F.Supp. at 358; *Liddell v. Board of Educ.*, 469 F.Supp. 1304, 1313 (E.D. Mo. 1979). It is also of record that the "actions of the State of Missouri intensified racial segregation in North St. Louis and in the entire St. Louis area." *Liddell v. Board of Educ.*, 667 F.2d at 657. Indeed, the State frankly admitted to the Eighth Circuit a year ago that "it is not surprising that some language can be found suggesting that State actions had discriminatory effects in the suburban schools." State Reply Brief, *Liddell v. Missouri*, App. Nos. 96-2994/3630, (8th Cir. Jan. 10, 1997) at 21.

declare the SLPS unitary. In describing these motions in its petition, the State presents facts that are simply untrue and fails to include other facts that served as the foundation for the actions of the district court and the Eighth Circuit. These misrepresentations appear directed at creating the misperception that the courts have delayed in addressing the State's motions and otherwise treated the State unfairly.[6] To the contrary, however, any delay in acting on the State's various requests is due to the unorthodox nature and handling of those requests by the State. In many instances, the State is simply the victim of its own "ready-fire-aim" litigation strategy. A recognition of this procedural history is important to a proper and full understanding of the lower courts' rulings. The State's repeated filings have muddied the procedural waters.

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[6] The State's allegation that "the entire history of the 17-year remedial phase of this proceeding has been characterized by collusion and delay" aimed at delaying the return of control of the schools to local authorities is also patently untrue. An admission by the most prominent State Defendant clearly shows the absurdity of the State's conjecture:

> The reason Missouri has been unsuccessful in ending the desegregation cases is that the State has never made a credible attempt to address the concerns of the federal courts. The state has always forcefully and consistently objected to the plaintiffs' demands. However, it has not offered potential solutions to the desegregation problem. . . .

Governor of Missouri. Mel Carnahan, *A Good Faith Effort on Desegregation*, St. Louis Post-Dispatch, Mar. 26, 1995 at 3B; State Response to First Request for Admissions, No. 16, *Liddell v. Board of Educ.*, No. 72-100 (E.D. Mo. 1996).

Moreover, the Board of Education has vigorously sought a return to local control and has often disagreed with the plaintiff groups. One notable example is the Board's August 1995 plan and motions relating to the withdrawal of judicial control through an orderly transition consistent with *Freeman v. Pitts*, 503 U.S. 466 (1992). *See* Board Motions, *Liddell v. Board of Educ.*, No. 72-100, G(1691)95, G(1692)95, G(1694)95, G(1696)95 (E.D. Mo. Aug. 15, 1995).

Late in 1991, the State Defendants filed the first of three different motions for unitary status. The State requested that the district court declare the SLPS "unitary," terminate state desegregation funding as proposed in the motion and ultimately release all defendants from court supervision. The parties, including President Bush's Justice Department, and the district court's own advisors, all responded that consideration of unitary status was clearly premature because the desegregation plans had not been fully implemented as required by this Court's decision in *Board of Education. v. Dowell*, 498 U.S. 237, 248-50 (1991). The State never replied to these responses despite express permission from the district court to do so. Instead, several months later, on May 7, 1992, the State filed a second motion requesting "partial unitary status."

On May 20, 1992, Judge Gunn ruled that the State's request for unitary status was premature, but held that the State was entitled to answers to certain discovery requests because "[t]he possibility exist[ed] that *in the future* such a declaration [of unitary status] might be warranted." *Liddell v. Board of Educ.*, No. 72-100, G(368)92, (E.D. Mo. May 20, 1992) (emphasis added). The State did not appeal Judge Gunn's decision.

In November 1993, the State filed its third motion and called it an "Amended Motion for Unitary Status." As the State conceded that it was not able to prove the allegations in its motion, however, it did not ask the court to schedule a hearing. Instead, the State informed the district court that it would prepare and submit a stipulated schedule for all proceedings on the motion. It estimated that it would be "prepared to present its evidence in support of this amended motion within approximately nine to twelve months." State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(980)93, (E.D. Mo. Nov. 22, 1993).

On October 17, 1994, almost a full year after filing its "Amended Motion" for unitary status, the State finally approached the district court to ask for a hearing date. On February

28, 1995, Judge Gunn granted the State's request and scheduled a hearing for September 1995 in accordance with the schedule proposed by the State. State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(1360)94, (E.D. Mo. Oct. 17, 1994). The hearing was later rescheduled for March 1996 to accommodate the conflicting schedules of the more than twenty parties to this case, including the State Defendants.

On June 12, 1995, as the parties were preparing for the hearing, this Court issued its decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995) ("*Jenkins III*"). In St. Louis, where the facts, prior decisions and procedural history differ significantly from Kansas City, the State Defendants did not file any motion raising alleged "*Jenkins III* issues" or seeking relief under *Jenkins III* for nearly seven months following this Court's decision.

On January 4, 1996, however, as the parties were deeply involved in extensive discovery for the rapidly approaching unitary hearing, the State filed a motion to terminate the VIDT on the basis of the *Jenkins III* decision. The State, however, asked the district court not to rule on its motion. Instead, the State described its motion as "conditional" and not "ripe" for court action because it wanted a ruling on the motion "only if the Court does not enter a finding of unitary status following the March 4, 1996 hearing." State Motion and Memorandum in Support, *Liddell v. Board of Educ.*, No. 72-100, G(1856)96 and G(1858)96, (E.D. Mo. Jan. 4, 1996). Other parties, including the Board of Education, responded that the district court should decide the *Jenkins III* issues prior to the unitary hearing. But the State vehemently opposed any ruling on its requests under *Jenkins III*. State Response, *Liddell v. Board of Educ.*, No. 72-100, G(1922)96, (E.D. Mo. Feb. 5, 1996). The State emphasized that its motion included an "explicit request that the legal issues raised" be addressed "only after the [unitary] hearing and in the event that the unitary motion is not granted in full." *Id.*

On February 15, 1996, the district court denied the *Jenkins III* motion stating that it was "not ripe" and, thus, had been "im-

providently filed." *Liddell v. Board of Educ.*, No. 72-100, G(1939)96, (E.D. Mo. Feb. 15, 1996). The State did not appeal the order denying its motion.

Following extensive discovery, the district court held a three week evidentiary hearing on the State's unitary status motion. Evidence was presented on behalf of more than twenty parties. Pursuant to the district court's directive, the evidence presented related to the elements of the unitary inquiry as well as various proposed plans for phasing out federal court supervision. The parties' proposals ranged from continuation of the VIDT, to a very abrupt termination of the VIDT, to long-range phase out plans.

On April 23, 1996, following the conclusion of the hearing, the district court issued its order stating that "the best conclusion of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools." *Liddell v. Board of Educ.*, No. 72-100, G(2062)96, (E.D. Mo. Apr. 23, 1996). As noted above, the court appointed Dr. Danforth, established various settlement procedures, and ordered that all components of the remedy would remain in place pending settlement efforts. In response to a State motion to alter or amend the district court's order appointing Dr. Danforth, the district court clarified the settlement procedures. Judge Gunn concluded: "The Court is confident that the Settlement Coordinator will proceed with all due diligence." *Liddell v. Board of Educ.*, No. 72-100, Order G(2134)96, (E.D. Mo. June 24, 1996). (Orders G(2062)96 and G(2134)96 shall hereinafter be referred to collectively as the "settlement procedure orders.")

Despite acknowledging the district court's desire that "the parties... devote full attention to [the] settlement process," State Motion, *Liddell v. Board of Educ.*, No. 72-100, G(2179)96, (E.D. Mo. Aug. 16, 1996), the State appealed the district court's settlement procedure orders and alleged that the district court did

not have authority to continue the VIDT in light of *Jenkins III*. The State also sought to stay the VIDT pending its appeal of the settlement procedure orders. The district court, the court of appeals and Justice Clarence Thomas as Circuit Justice each denied the State's requests to stay the VIDT. *See Liddell v. Board of Educ.*, No. 72-100, Order G(2175)96, (E.D. Mo. Aug. 14, 1996); *Liddell v. Missouri*, App. Nos. 96-2994/3630, Order dated Aug. 23, 1996, (8th Cir. 1996); *Missouri v. Liddell*, Applic. No. A-155, correspondence from United States Supreme Court Clerk, of August 30, 1997. On October 1, 1996, the State also appealed Judge Gunn's denial of the stay pending appeal.

On January 28, 1997, the court of appeals issued its decision dismissing all three of the State's appeals. *See Liddell v. Board of Educ.*, 105 F.3d 1208 (8th Cir. 1997). With regard to the State's appeal of the settlement procedure orders, the Eighth Circuit found the orders to be unappealable, interlocutory, case management orders related only to settlement procedures. *Id.* at 1212. With regard to the appeal of the order denying the State's request for a stay of the VIDT pending appeal, the Eighth Circuit held that such was not an appealable order. *Id.* The Eighth Circuit noted that the State's January 1996 *Jenkins III* motion had been denied by the district court and was not appealed. *Id.* at 1211.

The State's Petition for Rehearing En Banc of these issues was denied. The State did not seek this Court's review of any of those issues.

d. *The Motion to Modify Presently Before the Court.* Following the Eighth Circuit panel's decision dismissing the State's appeals of the settlement procedure orders, (but with its petition for rehearing of those issues en banc still pending), the State filed the motion with the district court that is presently before this Court. (Bd. App. at A-1). The State requested that the district court modify orders related to the VIDT to prohibit the recruitment and enrollment of new students only for the 1997-98 school year.

The State was careful to note that it did *not* "seek the immediate end of its funding obligations for the VIDT program." *Id.* That issue, it felt, "[would] be determined by the Eighth Circuit if the State [was] successful in obtaining a rehearing or rehearing en banc of [the settlement procedure orders]." *Id.* Rather, it only sought an order prohibiting the enrollment of new students for the 1997-98 school year:

> The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students in the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students.

(Bd. App. at A-8)

The State specifically reserved the right to raise the larger issue of the propriety of the entire VIDT program under *Milliken v. Bradley*, 418 U.S. 717 (1974) ("*Milliken I*") and *Jenkins III* at a later date: "The State in no way waives its right to seek additional relief from the Court's interdistrict Orders in the future including a complete termination of all State funding for the VIDT program." *Id.* at A-2 n.2. Thus, the *only* issue presented to the district court was whether transfers should be stopped for 1997-98.

On April 10, 1997, the district court issued an order denying the State's motion. (Pet. App. at 23a). The State appealed and again sought a stay of the VIDT pending appeal from the district court, the Eighth Circuit Panel, the Eighth Circuit *en banc*, and the United States Supreme Court. Again, the State's efforts to obtain a stay were rejected by each court. *Liddell v. Board of Educ.*, No. 72-100, Endorsement G(2394)97, (E.D. Apr. 15, 1997); *Liddell v. Missouri*, App. No. 97-2009, Orders dated Apr.

25 and May 22, 1997, (8th Cir. 1997); *Missouri v. Liddell*, Applic. No. A-861, correspondence from United States Supreme Court Clerk, of June 13, 1997.

e. *The Eighth Circuit's Decision Presently Before the Court.* On September 25, 1997, the court of appeals ruled that the district court had acted within its discretion in maintaining the desegregation remedy in place pending settlement negotiations. (Pet. App. 4a.) The court stated precisely its holding that in view of the complexity of the issues and the long history of mandated segregation:

> . . . [t]he district court did not abuse its discretion in denying the State's motion to phase out the voluntary transfer of black city students to the County Districts *pending settlement negotiations.*

(Pet. App. 21a) (emphasis added). The Eighth Circuit noted that it had ruled against the State on a similar question only several months earlier and that the State advanced no new arguments in the present appeal to cause the court to change its position. (Pet. App. 13a.)

The court also noted that the law strongly favors settlements. (Pet. App. at 14a.) The court of appeals stated that particularly in the desegregation setting, solutions depend on the good faith cooperation of all the parties, particularly the defendants. *Id.* Given the complexity of the issues that must be resolved in this case, either by settlement or by court order, the long-history of state-mandated segregation, and the difficulty of developing a plan sufficient to address the complex issues of the case, the court found that settlement would be the preferred conclusion. (Pet. App. at 15a-16a). Based on these factors, the court of appeals reached its ultimate holding and concluded that the district court did not abuse its discretion in refusing the State's request pending settlement negotiations. (Pet. App. at 16a).

REASONS FOR DENYING THE WRIT

I. THE STATE'S PETITION SEEKS TO RAISE AN ISSUE NOT DECIDED BY THE COURTS BELOW

This Court should deny the State's petition for certiorari because the sole issue the State seeks to raise in this Court - the propriety of the VIDT under *Milliken I* and *Jenkins III* - was not ruled on by the lower courts. This Court does not decide issues not resolved in the lower courts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

The only issue ruled on by the court of appeals was whether the district court abused its discretion when it refused to modify the desegregation remedy pending completion of the settlement process. The court held that considering the complexity of the case, the difficulty of developing a plan to end court supervision and the long history of State-mandated segregation, Judge Gunn did not abuse his discretion. (Pet. App. at 15a).

The State cites selected language and dicta to argue that the court of appeals made a broad substantive ruling on the applicability of *Jenkins III* to the remedy in St. Louis. That is simply wrong. The Eighth Circuit repeated five times that the question raised by the State, presented to the court and being decided was whether the district court erred in refusing to modify the VIDT "at this time" and "pending settlement negotiations." (Pet. App. at 4a, 15a, 16a, 21a).

Following its actual ruling that upheld the district court's decision not to terminate the transfer program during settlement negotiations, the Eighth Circuit discussed some of the difficult practical and legal problems facing the courts and the parties should the settlement efforts fail. The court noted that because the VIDT was the result of a settlement agreement, there has never been a finding in St. Louis that no interdistrict violation

occurred, as was the case in *Jenkins*. (Pet. App. at 19a). Indeed, as noted above, the record and court opinions already included specific findings of interdistrict acts and effects. *See supra* note 5. Thus, the court went on to note that if the interdistrict acts and effects that are of record are insufficient to support the VIDT under *Milliken I* and *Jenkins III*, the plaintiffs would have a due process right to prove further the interdistrict violation so that the courts could determine the proper remedy, if any. *Id.* This would not be without procedural difficulty, however, since the County school districts that had voluntarily participated in the VIDT for many years had received final judgments. *Id.* Thus, there were due process issues as to their involvement in future litigation.[7]

In view of all these circumstances, the Eighth Circuit concluded that the district court acted properly in refusing to terminate the VIDT "pending settlement negotiations." The court never ruled on the larger issue of the effect of *Jenkins III* on the St. Louis remedy.

Because the court of appeals did not decide the issue the State is attempting to raise here, the State's petition should be denied.

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[7] The State argues that the Eighth Circuit ruled that the county districts have a fundamental right to due process arising out of their participation in the VIDT which prevents terminating the VIDT. This argument misstates the court's decision. The court's due process discussion occurred in the context of the legal and procedural complexity of this case as related to the nature and scope of the interdistrict violation in St. Louis. The court noted that the county districts had voluntarily participated in the VIDT for many years under a settlement agreement that entitled them to judgments possibly relieving them from constitutional liability. The court expressed concern that forcing them to participate in further proceedings on the issue of interdistrict liability might conflict with the districts' right to due process. Emphasizing the uniqueness of the situation, however, the court also noted that the "plaintiffs would be equally deprived if they were denied the opportunity to prove interdistrict violations." Nowhere does the court imply, as the State suggests, that the VIDT must continue because the county districts have a right to due process arising out of an injunction.

II. THE EIGHTH CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE BEFORE IT

The Eighth Circuit correctly ruled that Judge Gunn did not abuse his discretion when he refused to modify this complex desegregation remedy pending the completion of court-ordered settlement efforts designed to end federal court supervision. The court fully considered the applicable legal principles, as well as the unique and difficult circumstances of this case. The Eighth Circuit's decision is based upon fundamental and universally accepted principles of law, does not involve a conflict among the circuits, does not involve a question of national importance, and does not require this Court's review.

The inherent powers of district courts include "considerable authority 'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 172-73 (1989) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)). This includes "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. ____, 137 L.Ed.2d 945, 968 (1997); *Landis v. North American Co.*, 299 U.S. 248, 254-56 (1936). In desegregation cases in particular, a district court's power is "characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Milliken v. Bradley*, 433 U.S. 267, 288 (1977) (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955)). This Court has instructed lower courts to "provide for an orderly means for withdrawing from control." *Freeman v. Pitts*, 505 U.S. 467, 490 (1992).

Moreover, it is well settled that the law favors a settlement. *Williams v. First National Bank*, 216 U.S. 582, 595 (1910); *St. Louis Mining and Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 656 (1898). *See also In re Air Crash Disaster*, 86 F.3d 498,

552 (6th Cir. 1996); *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 252 (8th Cir. 1996); *In re General Motors Corp.*, 55 F.3d 768, 784 (3rd Cir.), *cert. denied*, 116 S.Ct. 88 (1995); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1486 (11th Cir. 1994); *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 185 (4th Cir. 1993); *Conservation Law Foundation v. Franklin*, 989 F.2d 54, 59 (1st Cir. 1993). This principle is recognized in desegregation cases as well. *See Jones v. Caddo Parish School Bd.*, 704 F.2d 206, 221 (5th Cir. 1983); *Armstrong v. Board of School Directors*, 616 F.2d 305, 318 (7th Cir. 1980).

The rulings of the courts below conform exactly to these principles. The facts of this case demonstrate the correctness of both the district court and the Eighth Circuit rulings. The court of appeals and the district court are familiar with the complex issues that are involved in ending this case. The court of appeals has correctly noted that should it be determined that the findings of interdistrict acts and effects that exist in this case are insufficient to warrant the VIDT, then the plaintiffs would need to be provided an opportunity to prove further the interdistrict violation so that a proper, and possibly broader, remedy could be crafted if needed. This would involve another round of litigation and more court involvement.

Also, if the VIDT is terminated, the SLPS will be forced to accommodate a roughly 30 percent increase in student enrollment. The remedy in this case has been designed to provide education to approximately forty-three thousand students within the SLPS. The district court has required the closure of dozens of school buildings to establish a system able to serve this number of students. Termination of the VIDT, even gradually, will result in an influx of as many as 13,000 students into the

SLPS.[8] At this time, there is simply not enough space or financing to accommodate these children. The SLPS will face a shortage of school buildings, teachers, counselors, books, equipment and supplies. The pupil-teacher ratio would jump to a number in excess of the State's own desirable standards. At the same time, the St. Louis County districts that currently receive students would be forced to terminate hundreds of teachers and be left with vacant or under-utilized facilities.

Resolving these issues in the district court through litigation will bring great disruption and uncertainty to the lives of tens of thousands of children and to the two dozen districts trying to serve those children. The district court, acting within its discretion to manage its cases and direct the course of litigation, has chosen to temporarily maintain the remedies and to implement a settlement process that is designed to resolve all of these issues on terms agreed upon by the parties.

The court of appeals properly ruled that the district court acted within its discretion in refusing to modify the VIDT pending settlement negotiations. In doing so, the Eighth Circuit fully considered the district court's action in light of the many complex issues it faces in ending court supervision and in light of the discretion necessarily lodged with district courts. The court of appeals recognized that Judge Gunn's decision to continue the settlement process under the direction of Dr. Danforth and to provide for the orderly end of court supervision is discretionary, sensible and reasonable.

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[8] Even the "limited" relief sought by the State in the district court and the court of appeals would have caused serious disruption. If no new students are accepted into the VIDT in a given year, enrollment in the City schools would increase by several thousand students over current projections. The school system could not accommodate these additional students without sufficient lead time to somehow provide classroom space, teachers, books, equipment and supplies.

Because the court of appeals based its decision on fundamental principles of law and correctly ruled that the district court acted within its discretion in refusing to modify the VIDT pending the outcome of settlement efforts, this Court need not review the Eighth Circuit's decision.

III. THE ISSUE THE STATE DID RAISE BELOW IS MOOT.

An injunction proceeding becomes moot where the event sought to be enjoined has irretrievably occurred. *See, e.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969); *Hall v. Beals*, 396 U.S. 45, 48 (1969). This is particularly true where only limited relief is sought. *See Brockington*, 396 U.S. at 43.

Here, the State of Missouri made an affirmative decision to seek modification of an injunction to prohibit the recruitment and enrollment of students to the VIDT for the 1997-98 school year only and to release the State from its obligations to fund the education of such students. The enrollment and recruitment efforts for the 1997-98 school year are now complete. Students have been enrolled and attending school under the program for more than half the year. By the time this case is decided, the school year will be over or nearly over. Thus, even if the State succeeds in its appeal, it will not be able to obtain the relief it sought from the courts below.

Mootness might be considered an unimportant, technical issue had the State not been so extremely precise in the issue that it raised before the district court. The State Defendants repeatedly "request[ed] a limited modification to outstanding orders that merely prohibits any new students from enrolling in the VIDT program for the 1997-98 school year." (Bd. App. at A-2). Seven times in its motion and suggestions in support, the State clarified that it was seeking modification of the interdistrict

components of the remedy only for the 1997-98 school year. *Id.* at A-2, A-3, A-6, A-7, A-8. Even its final prayer for relief is limited to the 1997-98 school year. *Id.* at A-8.

Moreover, the State specifically noted that it was *not* asking the district court to decide the larger issue it now seeks to raise: "The State does not seek the immediate end of its funding obligations for the VIDT program - that more global issue will be determined by the Eighth Circuit Court of Appeals if the State is successful in obtaining a rehearing or a rehearing en banc of [the settlement procedure orders]." *Id.* at A-1 to A-2.

The State maintained this position in the court of appeals where it clarified that "in this appeal, the State seeks only the more limited relief [relating to transfers for the 1997-98 school year]." Brief of Appellants State of Missouri, *Liddell v. Missouri*, App. No. 97-2009 (8th Cir. May 27, 1997), at 4 n.7. It also stated that "resolution of the appeal" must occur in advance of the 1997-98 school year." *Id.* Indeed, the State expressly admitted that the "larger issue remains the subject, for now, of the settlement discussions initiated in April 1996 by the District Court." *Id.*

Thus, the "global issue" — which the State Defendants seek to raise here — was, according to their filings in the district court and the court of appeals, a part of another appeal, which the State Defendants lost and did not bring before this Court.

The expressly limited nature of the State's request supports a refusal to invoke any exception to the mootness doctrine. The State specifically noted its view that the "global issue" of whether *Jenkins III* required the termination of the VIDT was before the court of appeals at the time it filed the motion presently on appeal. The fact that the State did not obtain a favorable ruling on its broader issue from the Eighth Circuit in another appeal should not allow the State to import that issue to this appeal. If

the State was not satisfied with a ruling in another appeal, it should have sought this Court's review of that ruling. Granting the State's Petition would reward its short-sighted litigation tactics.

Because the issue the State raised to the district court is now moot, this Court should deny the State's Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated herein, the State's Petition for a Writ of Certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 72-100 C(6)
G(2338)97

MICHAEL C. LIDDELL, et al.,
Plaintiffs,

v.

THE BOARD OF EDUCATION
OF THE CITY OF ST. LOUIS, et al.,
Defendants.

STATE DEFENDANTS' MOTION TO MODIFY THE COURT'S OUTSTANDING INJUNCTIONS RELATING TO THE "VOLUNTARY INTERDISTRICT TRANSFER PLAN" AND SUGGESTIONS IN SUPPORT THEREOF

Two years ago, in *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995) (*Jenkins III*), the Supreme Court unequivocally held that the State of Missouri cannot be ordered to participate in or fund interdistrict remedies based solely on a finding of an intradistrict violation in a school desegregation case.[1] Since the current interdistrict remedial orders are based purely on intradistrict liability findings, the State, as a matter of law, is entitled to a lifting and dissolution of the interdistrict orders and to release from any further responsibility to fund these programs.

In its present motion, however, the State does not seek the immediate end of its funding obligations for the VIDT program — that more global issue will be determined by the Eighth Circuit Court of Appeals if the State is successful in obtaining a rehearing or a rehearing en banc of appeal numbers 96-2994

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[1] *Missouri v. Jenkins*, 115 S. Ct. 2038, 2050 (1995).

and 96-3630, which were recently dismissed by the Eighth Circuit panel. Instead, the State at this time seeks only an order from the Court directing that all parties and all Court advisory panels immediately cease all efforts to recruit and admit new students into the VIDT program and that relieves the State from any funding obligation as to such students.

As the Court is aware, the cost to the State of providing this program, including transportation to and from every corner of St. Louis County for this now-impermissible program is enormous, amounting to approximately $100 million dollars each year. Further, the other parties to this action have taken the united position that once enrolled in the program, every VIDT child is absolutely entitled to continue in the program through graduation, even *after* this Court declares the SLPS unitary. The other parties are flatly wrong as to the students' legal right to continue in the program once unitary status is ordered in this case. But if they were to prevail in this view, each child enrolled in 1997-98 would be entitled to 12 additional years of schooling in the VIDT, extending this seventeen-year old remedy to at least 2009. As such, the State now requests a limited modification to outstanding orders that merely prohibits any new VIDT students from being added to the VIDT program for the 1997-98 school year.[2]

It is important that this Court promptly issue its order in this regard because the calendar is not standing still. Already, the lottery for VIDT seats is taking place (it began on March 14, 1997) and planning for the 1997-98 budgets for the VICC and the

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[2] The State in no way waives its right to seek additional relief from the Court's interdistrict orders in the future, including a complete termination of all State funding for the VIDT program. The State is entitled to full and complete funding relief as to all the interdistrict programs that have been ordered without any findings of interdistrict liability. *See Jenkins III*, 115 S. Ct. at 2050.

VIDT program will soon be under way (the budgets are due to be submitted in May or June). Any delay is likely to result in needless hardship on prospective VIDT families and needless unhappiness to prospective new students who are accepted into a program that simply cannot continue under the law. Unnecessary delay could also inconvenience the participating school districts that must decide very shortly how many teachers will be retained for the upcoming school year. Under Missouri law, the districts must notify their teachers of who will be retained no later than April 15, 1997.

In light of these impending deadlines and the clear mandate of *Jenkins III*, the Court should modify its previous orders in this case under Fed. R. Civ. P. 60 to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year.[3]

SUGGESTIONS IN SUPPORT

A. Jenkins III *Prohibits Interdistrict Remedies in this Intradistrict Case*

On June 12, 1995, the Supreme Court issued its decision in *Missouri v. Jenkins* which involved, among other things, interdistrict programs that had been ordered by the courts in the intradistrict Kansas City school desegregation case. In that case, the Supreme Court reaffirmed the long-standing principle that a

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[3] The State is aware that the Court had hoped that the long-delayed settlement talks would resolve the program's future. However, recent settlement efforts concerning the issue of new VIDT students for the 1997-98 school year are at an impasse. Any resolution of this issue can only be attained through a ruling of this Court. The State does not now argue that the parties should discontinue their settlement efforts. But the precise question at issue here — will *Jenkins III* be ignored and the State required to continue to fund the costs of students entering the VIDT for the first time in 1997-98 — cannot be resolved through those proceedings and thus requires the Court's determination.

district court "exceeds its remedial authority" when it seeks to cure an intradistrict violation with a remedy that has an interdistrict purpose.[4] The Court, in rejecting the interdistrict components of the Kansas City plan, held that those components exceeded the clear limits on the district court's remedial authority.[5] The Court spelled out its reasoning succinctly:

> [A] desegregation remedy "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." "[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy."[6]

The District Court in *Jenkins* lacked such remedial authority because, exactly as in this case, an *inter*district violation had never been found. The only violation that had been found was *intra*district in nature.[7] As held by the Court, "the proper response to an intradistrict violation is an intradistrict remedy."[8]

As in *Jenkins*, there never has been a finding here of an interdistrict violation. Indeed, there has never even been a hearing on interdistrict liability. In 1980 the Court of Appeals made plain the basis of liability, which involves only an *intra*district violation, when it held the Board and the State responsible for past segregation occurring solely *within* the City

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[4] *Jenkins III*, 115 S. Ct. at 2048 (quoting *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*)).

[5] *Id.* at 2050.

[6] *Id.* at 2048 (quoting *Milliken I*, 418 U.S. at 746).

[7] *Id.* at 2050.

[8] *Id.* (citing *Milliken I*, 418 U.S. at 746-47).

of St. Louis.[9] The Court of Appeals further made clear the solely intradistrict basis of liability in this case when it observed in 1984 that "[w]e emphasize again that the objective of transfers between the city and county is the eradication of segregation *within the city.*"[10]

Although plaintiffs and City Board added a number of suburban districts as defendants in pursuit of their interdistrict claims in the early 1980's, these claims were never resolved and no hearing was ever held on these claims. Instead, in 1983, the suburban districts, plaintiffs and the SLPS entered into a settlement plan, that specifically recited that the suburban districts *did not* admit liability for any interdistrict claims.[11] This Court's order approving the Settlement Plan in 1983 did not add any finding of interdistrict liability and, in adopting most of the plan, endorsed the suburban districts' express exclusion of any admission of interdistrict liability. The Court of Appeals affirmed much of this Court's order approving the settlement plan, including the requirement that the State fund interdistrict remedies based only on an intradistrict violation.[12]

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[9] *Adams v. United States* ("*Liddell II*"), 620 F.2d 1277 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980). There was a discrete interdistrict violation assertedly found with respect to the provision of vocational education. But that violation has been addressed by a long-running interdistrict remedy. It would not, of course, justify a system-wide interdistrict remedy. *See Lewis v. Casey*, 116 S.Ct. 2174, 2183 (1996) (scope of the remedy must be congruent with scope of the violation); *Jenkins III* 115 S. Ct. at 2049.

[10] *Liddell v. Missouri*, 731 F.2d 1294, 1302 (8th Cir. 1984) (*Liddell VII*) (emphasis added).

[11] Settlement Agreement, Page 70, §XI, ¶C. In fact, not only has there never been a finding of an interdistrict violation involving any suburban districts, but each such district has actually received a final judgment in its favor.

[12] *Liddell VII*, 731 F.2d at 1302.

In *Jenkins III*, the Supreme Court held that the District Court acted beyond its remedial authority when it ordered the State to fund remedies "not solely designed to redistribute the students *within* the [City]."[13] In the words of Justice Thomas, "[t]he time has come for [the Court] to put the genie back in the bottle."[14] On the basis of the unambiguous holding in *Jenkins III* this Court should modify its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year.[15]

B. *Modification of the Court's Injunctions Is Necessary Now*

Already an entire year has passed with no resolution of the State's request that it be released from this case. By the end of this school year, the State will have paid approximately $141 million since the end of the March, 1996 unitary hearing. Now, VICC and the participating school districts are gearing up for another year of interdistrict transfers and the parties are at an impasse in the settlement discussions as to whether new children

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[13] *Id.*, 115 S. Ct. at 2051.

[14] *Id.* at 2066 (Thomas, J., concurring).

[15] The power of the Court to modify its injunctions to stop the enrollment of new students is unquestionable. Indeed, with the change in relevant decisional law represented by *Jenkins III*, it would be clear error for the Court to refuse the relief requested by the State. *See Protectoseal Co. v. Barancik*, 23 F.3d 1184, 1187-88 (7th Cir. 1994) (it is an abuse of discretion to refuse to modify an injunction founded on superseded law when change in law authorizes what previously had been forbidden); *Flavor Corp. of Am. v. Kemin Indus.*, 503 F.2d 729, 732 (8th Cir. 1974) ("[i]t is well established that injunctions do not give rise to vested rights; they enforce only rights existing under current law and conditions"); *Payne v. Toan*, 671 F. Supp. 1247, 1249 (W.D. Mo. 1987) (permanent injunction "must be vacated" where injunction was based on an interpretation of law that has been rendered incorrect by a subsequent Supreme Court decision).

should be enrolled in the VIDT for next year.[16] With the rapid approach of statutory and budgetary deadlines,[17] the Court must act promptly on the issue of whether new children should be permitted to enroll in this legally unjustifiable program for 1997-98. To delay a ruling would not only hamper the planning process of all involved, but would also have the practical effect of denying the State the opportunity to have this issue resolved by the courts before the start of the next school year.

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[16] Because the Court has ordered that the content of the settlement discussions remain confidential, the State is not in a position to amplify its statement that the talks have reached an impasse on this issue. However, if any party were to seek further delay by challenging this assertion, the State is prepared to support it factually.

[17] As a matter of state law, under Mo. Rev. Stat. 168.126, school districts are required to notify probationary teachers who will not be retained on or before April 15 of their termination. And, under the Court's prior orders, budgets for the interdistrict components must be submitted to the Court over the next two to three months. Moreover, the magnet lottery process has already begun and students and their families will soon be looking and planning toward next year.

CONCLUSION

The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students into the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct-copy of the foregoing has been served on the parties of record via United States Mail, postage prepaid, on this 14th day of March, 1997.

_____

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JAN 28 1998
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No. 97-888

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
MICHAEL C. LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Earline Caldwell, et al., the National Association for the Advancement of Colored People, and Michael Liddell, et al., representing certified classes of school children in metropolitan St. Louis, respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That opinion is reported at 126 F.3d 1049 (8th Cir. 1997).

STATEMENT OF THE CASE

A complete and accurate understanding of the procedural history and background of this case, important to the Court's consideration of the pending petition for certiorari, has not been furnished by petitioners, the State of Missouri, et al. ("State"), defendants below. In an apparent attempt to capture the Court's attention, petitioners seek to paint a picture of foot-dragging and delay by the

courts below and a court-mandated settlement negotiation corrupted by the bias of the settlement coordinator (Dr. William Danforth, who is a respected leader in the St. Louis community) and deadlocked by the "patently unreasonable" demands of the parties. The petition is so replete with erroneous statements and omissions concerning the relevant history of the litigation and the facts and context of the settlement process as to warrant a substantial response.

Caldwell-NAACP and Liddell respondents respectfully contend that far more accurate and inclusive histories of the relevant developments in this litigation have been recounted by the court of appeals itself in its two most recent decisions concerning the remedies at issue in the petition. *See* Pet. App. at 4a-12a & n.1; *Liddell v. Board of Educ.*, 105 F.3d 1208, 1210-1212 (8th Cir. 1997), and cases cited therein. While it would be impracticable to recite this entire history here, Caldwell-NAACP respondents call the Court's attention to the following facts most relevant to this appeal, as well as to those misstatements of fact in the State's petition which have a bearing on the question of "what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2.

Background

The early history of this school desegregation litigation is recounted in several opinions of the Court of Appeals. *See* Pet. App. at 4a-12a & n.1; *Liddell,* 105 F.3d at 1210-12; *Liddell v. Missouri (Liddell VII),* 731 F.2d 1294, 1298-1301, 1304 (8th Cir.) (en banc), *cert. denied,* 469 U.S. 816 (1984); *Adams v. United States,* 620 F.2d 1277, 1281-84 (8th Cir.) (en banc), *cert. denied,* 449 U.S. 826 (1980). Significantly, the remedies approved by the courts below were predicated on findings that both the St. Louis Board of Education ("City Board") and the State were responsible for maintaining school segregation in violation of the constitutional rights of plaintiff school children. *See Liddell VII,* 731 F.2d at 1302-03; *Liddell v. Board of Educ.,* 567 F. Supp. 1037, 1052 (E.D. Mo.

1983) (approving settlement and ordering State to fund a Voluntary Interdistrict Transfer Program), *cert. denied*, 469 U.S. 816 (1984). *See also Liddell v. Board of Educ.* (*Liddell V*), 677 F.2d 626, 629 (8th Cir.) (noting prior holding that State had substantially contributed to school segregation), *cert. denied*, 459 U.S. 877 (1982); *Liddell v. Board of Educ.*, 667 F.2d 643, 654 (8th Cir.) (reaffirming recognition of causal relationship between State's actions and school segregation), *cert. denied*, 454 U.S. 1081 (1981); *Adams*, 620 F.2d at 1291, 1294 n.27 (finding State and suburban school districts had substantially contributed to school segregation); *Liddell v. Board of Educ.*, 491 F. Supp. 351, 357, 359-60 (E.D. Mo. 1980) (holding specifically that State had previously "mandated school segregation," that it "never took any effective steps to dismantle the dual system it had compelled by constitution, statutory law, practice and policy," and that it was a "primary constitutional wrongdoer" with respect to the "segregated conditions in the St. Louis public schools"), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981).

1. The Voluntary Interdistrict Transfer Program. In the phase of this litigation most relevant to this appeal, the plaintiffs and the City Board sought relief on a metropolitan-wide basis, involving suburban school districts surrounding the city of St. Louis. *See, e.g., Liddell VII*, 731 F.2d at 1299. The basis for the relief was that the defendants, along with the State, had acted in violation of the law, with the intent and effect of maintaining segregated schools and school systems on a metropolitan-wide basis. *See id.; Liddell V*, 677 F.2d at 640. Plaintiffs and the City Board sought and were permitted to add St. Louis County officials and school districts as defendants to the litigation; the district court then scheduled a hearing on plaintiffs' interdistrict claims, while at the same time encouraging the parties to settle. *Liddell VII*, 731 F.2d at

1299-1300.[1] Shortly before the scheduled hearing, and with the assistance of a court-appointed expert, the parties arrived at a settlement agreement which provided, *inter alia,* for the voluntary transfer of black students from the city of St. Louis to twenty-three County districts and of white students residing in the County to city magnet schools. *Id.* at 1300.

Following a fairness hearing conducted pursuant to Rule 23 of the Federal Rules of Civil Procedure, the district court in 1983 approved the settlement agreement and consent decree, and apportioned the costs between the City and State defendants. *Liddell,* 567 F. Supp. 1037. The State, as a non-consenting party, appealed. In 1984, the court of appeals, sitting en banc, affirmed the district court's approval of the settlement and apportionment of costs (with modifications that are not pertinent here), finding that the remedy "was closely tailored to the nature and scope of the violation" and determining that the proposed voluntary interdistrict transfer program ("VITP") met constitutional standards. *Liddell VII,* 731 F.2d at 1305-09. Significantly, the court noted a host of State constitutional and statutory provisions mandating segregation, including, *inter alia,* that

> [u]nder the segregated system, the State bused suburban black students from St. Louis County into the city's black schools to maintain the dual system. The city schools remained largely segregated until this Court's decision in *Adams.*

Id. at 1306. *See also id.* at 1305-06 & n.9. On the basis of these and prior findings in the litigation, *see, e.g., Adams,* 620 F.2d at 1291, 1294 n.7, the court concluded that

> the State's presence in public education is immense and that the State's Constitution and statutes man-

[1] The court entered this order in 1982, not 1992 as Petitioners erroneously state. (Pet. at 5.)

> dated discrimination against black St. Louis students on the broadest possible basis. It is equally clear that the discriminatory policies continued after the Supreme Court decided *Brown I* . . . in 1954. Given the breadth of the State's violation, it was appropriate for the district court to mandate an equally comprehensive remedy.

Liddell VII, 731 F.2d at 1306 (citing *Brown v. Board of Educ.,* 347 U.S. 483 (1954)). Further, relying on *Hills v. Gautreaux,* 425 U.S. 284 (1976), the court distinguished *Milliken v. Bradley (Milliken I),* 418 U.S. 717 (1974) on grounds that the "breadth, gravity and duration of the state's violation here was much greater" and that the proposed remedy did not threaten, coerce or reorganize autonomous local school districts. *Liddell VII,* 731 F.2d at 1307-08. This Court denied certiorari. 469 U.S. 816 (1984).

In the intervening years, plaintiffs began to enjoy some of the benefits of the remedies contained in the settlement agreement, while at the same time they were, and continue to be, denied the full measure of the relief to which they have been entitled under the settlement agreement and remedial orders of the courts below. As the court of appeals observed early last year, in the intervening years following the courts' approval of the settlement agreement, more than eighteen appeals were taken, "usually on questions relating to the responsibility of the State of Missouri to fund various aspects of the [remedial] plan." *Liddell,* 105 F.3d at 1211. (*See also* Pet. App. at 8a-9a.) Moreover, several of these appeals concerned, or were predicated on, delayed or deficient compliance with the remedial orders by one or more defendants. In each instance, when confronted with shortcomings in compliance, the court of appeals affirmed the validity of the remedial orders (including the funding orders) and ordered the parties to act expeditiously to achieve full compliance. *See* Pet. App. at 8a-9a (citing *Liddell v. Board of Educ.,* 882 F.2d 298, 299 (8th Cir. 1989); *Liddell v. Board of*

Educ., 873 F.2d 191, 194 (8th Cir. 1989); *Liddell VII*, 731 F.2d at 1301-09). Significantly, when confronted with evidence that VITP enrollment fell short of the 15,000 goal specified in the consent decree—a situation which continues to this day[2]—the court of appeals affirmed the obligations of the parties to reach the goal, and of the State specifically to "fund interdistrict transfers necessary to reach 15,000 students—no more, no less." (Pet. App. at 8a (citing *Liddell*, 873 F.2d at 194)). Contrary to the State's suggestion (Pet. at 6), neither the settlement agreement itself, nor the court of appeals' decisions construing it, considered the 15,000 figure as a "cap" on VITP enrollment, but rather as an achievable, and enforceable, goal. Moreover, as the court of appeals noted, on several key occasions when it could have sought this Court's review of its remedial obligations, the State did not petition for a writ of certiorari. (Pet. App. at 9a-12a.)

2. *The Unitary Status Proceedings.* The instant appeal grows out of decisions made just before and shortly after a three-week hearing in March, 1996, in which the district court received evidence concerning whether and to what extent the State defendants in this litigation had fulfilled their remedial duties to the plaintiff class. (Pet. App. at 9a-12a (detailing history of unitary status and related proceedings)). The Court convened the hearing in response to a request made by the State in October 1994, pursuant to an "Amended Motion for Unitary Status," which it filed in November, 1993. The following clarifications of the facts and procedural developments prior to the March 1996 hearing are relevant to this petition:

First, petitioners are incorrect in characterizing their unitary status request as "languishing" in the district court,

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[2] According to the most recent report filed with the district court, on November 5, 1997 there were only 12,746 transfers from city to county schools. G(2660)98, Voluntary Interdistrict Coordinating Council for the Settlement Agreement, *Fourteenth Report To The United [States] District Court Eastern District of Missouri* at 11 (Jan. 1998).

and in attempting to link the March 1996 hearing with its earlier failed attempts to obtain unitary declarations. (Pet. at 8-9.) Those petitions were brought at a time when the record in this case clearly shows the remedies had not been fully implemented: the magnet school plan, capital improvement program, *Milliken II*[3] programs, vocational educational plan, and voluntary transfer program all were either untested or incomplete. *See* Appellee City Board Br., Nos. 96-2994, 96-3630 (8th Cir. Jan. 2, 1997). For this reason, the petitions were opposed by plaintiffs and other parties as premature, and the district court agreed. The State did not appeal. (Pet. App. at 9a.) When the State renewed its request by filing the November 1993 motion, it admitted it would need up to a year to prepare its evidence, and waited nearly a year before asking the district court to set a hearing. (Pet. App. at 9a-10a.) The district court acted expeditiously (after consideration of other parties' positions) and set the hearing for September 1995—hardly an unreasonable timeframe given the complexity of the issues. The court's later postponement of the hearing until March 1996 was also not unreasonable in light of the extensive discovery and the numerous expert witnesses involved.

Second, the petition fails to disclose to this Court that just before the 1996 hearing commenced, the State itself sought to postpone, until after the unitary status proceedings, consideration of the very question that it now seeks to raise: the validity of the VITP. In January, 1996, State defendants filed in the district court a self-described "conditional" motion to vacate all orders respecting the interdistrict remedies in this case, arguing in their accompanying memorandum that the St. Louis VITP contravened this Court's decision in *Missouri v. Jenkins*, 515 U.S. 70 (1995). The State defendants asked, however, that this motion be deferred until after an adjudication of their motion for unitary status, and that the motion be

[3] *Milliken v. Bradley* (*Milliken II*), 433 U.S. 267 (1977).

heard by the court only if the court did not find that unitary status had been attained. The State conceded at the time it was filed that its motion was not ripe. (*See* Pet. App. at 10a.)

In response to this motion, several of the parties asked the district court to decide the so-called *Jenkins* issue prior to any hearing on unitary status. G(1877)96, G(1880)96, G(1916)96. The State opposed the parties' request that the court hear the *Jenkins* issue first, arguing that "plaintiffs' motions should be denied for the simple reason that they ask the Court to do precisely the opposite of what the State requested in the Motion to Vacate. The State clearly asked that the motion be addressed *only if the State's unitary status motion is not granted.*" G(1922)96 at 2 (filed Feb. 5, 1996) (emphasis supplied).

On February 15, 1996, the district court denied the state's motion on grounds that it was not ripe and was "improvidently filed." G(1939)96 at 1. In this same order, the court also considered requests by the plaintiffs and the United States for postponement of the hearing and appointment of a settlement coordinator. The district court indicated that while it would proceed with the hearing, it "agreed with plaintiffs that the best resolution of this case would be an agreed-upon plan for ending Court supervision of the St. Louis Public Schools," and noted that it might appoint a settlement coordinator at the conclusion of the trial when prospects for settlement might be greater. (Pet. App. at 10a (quoting G(1939)96 at 2)). State defendants did not appeal this order denying their *Jenkins* motion and placing the parties on notice that the trial court preferred to have the litigation concluded via a settlement.

Finally, in connection with the unitary status hearing, the State has misled this Court by making assertions that not only were never adopted as findings by the trial court, but were vigorously contested by the respondents and other parties both at the hearing and thereafter. The uni-

tary status hearing lasted three weeks and was preceded by extensive discovery. Thousands of pages of exhibits were involved, and numerous witnesses, including experts, were called by the various parties. For example, the Caldwell, Liddell and United States plaintiffs alone called six expert witnesses, each of whose testimony challenged in significant respects the State's contentions that the St. Louis Public Schools were unitary and that the State should be relieved of further remedial obligations. The State's misstatements in connection with matters at issue at the hearing include the following:

(a) The State makes numerous representations throughout the petition concerning the costs of desegregation programs and concerning other educational expenditures in St. Louis and elsewhere in the State of Missouri. (*See, e.g.*, Pet. at 2, 3, 8, 21 & App. at 25a-30a.) Extensive testimony, including expert testimony, by various parties at the March, 1996 hearing was devoted to funding issues. Plaintiffs and the City Board contested at the time, and continue to contest many of the State's contentions concerning these issues.[4] There has been no adjudication of these or any other facts which fully with court orders and to eradicate, to the

(b) Similarly, the State also proffers as "undisputed fact" that "St. Louis currently has no racially

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[4] For example, the State claims that in 1994-95, the St. Louis Public Schools spent $8,132 per pupil, while most school districts in the rest of the State spent $4,553 per pupil. The State also claimed in its petition, filed on November 25, 1997, that 1994-95 was the "most recent year for which the Missouri Department of Elementary and Secondary Education (DESE) has comprehensive data available." (Pet. at 8.) Yet, a search of the DESE data base on the Internet reveals that data is available through and including the 1996-97 school year, and that in 1994-95, according to these same State defendants, St. Louis Public Schools spent $7,218.58 per child, while the State average was $4,972. http://services.dese.mo.us/schooldata/1995/15115/finanone.html.

discriminatory practices, policies or procedures in any area of school operations." (Pet. at 9.) To the contrary, plaintiffs and other parties offered extensive testimony concerning the failure of both City and State defendants to comply fully with court orders and to eradicate, to the extent practicable, the vestiges of the *de jure* system. Again, there has been no finding, one way or the other, by the trier of fact.

3. Settlement Negotiations. A month after the conclusion of the hearing, and before the transcript was complete and a post-trial briefing schedule established, the district court, on its own motion, ordered the appointment of Dr. William H. Danforth [5] as Settlement Coordinator, indicating that "the Court believes a serious settlement effort . . . should be undertaken at this time." G(2062)96, Memorandum and Order of April 23, 1996. The court also stated, for the second time in less than three months, its belief that the best resolution of the litigation would be a settlement "ending Court supervision of the St. Louis Public Schools." *Id.* This order also spelled out the duties and authority of the Settlement Coordinator, ordered counsel and parties to "attend all meetings as requested by the Settlement Coordinator" and to "participate in good faith," stayed the post-trial briefing schedule, and clarified that "during settlement negotiations, all components of

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[5] Dr. Danforth is the former Chancellor and current Chairman of the Board of Washington University in St. Louis. Prior to his appointment as Settlement Coordinator, he had served as chair of a committee of St. Louis area business leaders which studied the court-ordered desegregation programs and sought to provide the court, through court-appointed *amicus*, with a "detailed, impartial analysis of the desegregation plan," including recommendations for steps to be taken to preserve the benefits to the community while at the same time achieving "the goal of ultimately returning the school district to local control." G(1901)96. *See also* G(1881)95, App. A, Report of the Civic Progress Task Force on Desegregation of the Public Schools (Nov. 27, 1995).

the Settlement Agreement now in force shall continue as they are currently operating." *Id.*

Following Dr. Danforth's appointment, the State, through an incessant barrage of motions and stay applications in the district court, in the court of appeals, and in this Court (directed to Justice Thomas as Circuit Justice), sought to circumscribe the authority of the settlement coordinator, to truncate and denigrate settlement negotiations, and to obtain court orders terminating portions of the remedy in advance of the requisite judicial findings. These efforts were rejected by the courts at every turn and are accurately described by the court of appeals. Pet. App. at 11a-12a; *Liddell,* 105 F.3d at 1211-12. At the same time, the court of appeals endorsed the court-ordered settlement negotiations (Pet. App. at 13a-16a), while affirming the broad discretion of the trial court to control its docket and to maintain existing remedies while negotiations take place. *Liddell,* 105 F.3d at 1212.

Unfortunately, however, the State has sought in its petition to portray the settlement process as a sham and the Settlement Coordinator as "an outspoken advocate of interdistrict busing" who has done no more than "initiate[] but a handful of meetings over 19 months." (Pet. at 9-10. *See also* Pet. at 26-29.) Although the district court has ordered the parties to maintain confidentiality in the negotiations themselves, respondents are permitted to cite the following developments in the settlement process, which are a matter of public record:

(a) Contrary to the State's petition, Dr. Danforth has convened more than a "handful of meetings" since his appointment as settlement coordinator. While only a limited number of large group meetings involving all the parties' counsel have been convened, Dr. Danforth has initiated or sanctioned numerous other meetings and discussions among the many parties to the litigation, including the State.

(b) Dr. Danforth has enlisted the *pro bono* assistance of two highly respected lawyers in the St. Louis community who have also participated in numerous discussions and meetings with the parties and others. He has also involved others in the discussions, including court-appointed experts and committees, and school superintendents in the St. Louis area. He has secured the assistance of fiscal and other experts, as well as researchers from Washington University, St. Louis University, State agencies and elsewhere in the State. In these and other undertakings, Dr. Danforth and his staff have sought to narrow differences among the parties on the numerous, complex issues involved in reaching an agreement. These issues have included: current educational and desegregation expenditures; revenue and taxation; school construction; maintenance and capacity; transportation, and educational programs. In respondents' view, these efforts, which are ongoing, have been largely successful to date.

(c) Dr. Danforth has also sought to facilitate a political consensus in the state of Missouri which would pave the way for a lasting settlement and an end to court supervision. In this connection he has testified before and worked closely with a bipartisan joint committee of the State Legislature on desegregation, which was convened for this purpose. Dr. Danforth's brother, former United States Senator John Danforth, has also volunteered and lent his support to these efforts. While respondents do not know what the outcome will be, they anticipate that the legislature shortly will consider comprehensive legislation proposed by this Joint Committee and designed to foster conditions for a lasting settlement and an end to court supervision. *See* Senate Bill 781

(Mo. 1998); http://www.senate.state.mo.us/comm/minutes/deseg/main.htm. In 1996, the committee held several hearings in various parts of the state and received testimony from a wide variety of constituencies (including plaintiffs, the City Board, school districts, parents, teachers and others), as well as experts, and issued a report in December, 1997 which formed the basis for the legislation. *See* Missouri General Assembly Final Report of the Joint Interim Committee on School Desegregation and Finance (Dec. 1997).

(d) Finally, in encouraging the parties to come to agreements, Dr. Danforth has facilitated an interim settlement between the Caldwell-NAACP and Liddell plaintiffs and the City Board defendants. This agreement, announced after the State filed its petition, provides for a modification of certain "*Milliken II*" remedies, termination of intradistrict remedies the plaintiffs and the City Board have agreed have been ineffective in eliminating the vestiges of segregation in city schools, and their replacement—at no additional cost to the State or the City Board—with initiatives designed to improve schools' accountability and to strengthen professional development for teachers in racially isolated schools. The parties have agreed to ask Judge Gunn for the approval needed to implement these provisions. Moreover, both the plaintiffs and the City Board are continuing to negotiate a comprehensive settlement and end court supervision over intradistrict remedies. While negotiations are still proceeding on these larger issues, respondents are optimistic that the interim agreement concluded earlier this month will form the basis for a larger agreement to end this litigation.

The State has further sought to portray plaintiffs as collusive and unreasonable, alleging, *inter alia*, that

> this entire proceeding has been collusive between the plaintiffs and their school district allies, and none of the courts below (and certainly not the parties who have benefitted financially at the State's expense) has any interest in facilitating achievement of the end goal of all desegregation cases—the return of local schools to the control of local governing bodies operating in compliance with the Constitution.

(Pet. at 26-7.) The record in this case, however, contains no support for such hyperbolic and provocative assertions. At no point during this litigation has a court below made any findings, or considered any credible evidence that plaintiffs "colluded" with the City Board defendants, or otherwise worked with those defendants in an impermissible manner. To the contrary, in approving the underlying settlement agreement pursuant to Rule 23, the district court specifically found an absence of collusion. *Liddell*, 567 F. Supp. at 1045.

Nor is there any support in the record, or in fact, for the State's claims that a negotiated settlement will not be possible because the respondents have made "patently unreasonable demands." (Pet. at 28.) The only support proffered by the State—its characterization of testimony of plaintiffs' lead counsel at a state legislative committee hearing—is inaccurate. (Pet. at 10, 28.) At no time has plaintiffs' counsel "stated categorically that there will be no settlement" unless there is a guaranteed "increase in State funding to the [St. Louis Public Schools] to $9556 per pupil per year." (Pet. at 10.) To the contrary, the testimony referred to by the State describes the desires of these respondents to avoid increases in costs, to defund ineffective programs, and to work cooperatively with other parties, including the State legislative branch, to reach a lasting settlement to this litigation. Transcript of Hearings of Missouri Joint Interim Committee on School De-

segregation and Finance Issues at 317-342 (Oct. 7, 1997) and 32-81 (Nov. 5, 1997).

Finally, respondents note that at no time since his appointment as the settlement coordinator has Dr. Danforth declared, or been petitioned by the State to declare, that an "impasse" exists among the parties. (Pet. at 12.) Nor has the State sought a determination by Dr. Danforth, or by the district court to whom he reports, that respondents have not complied with the court's order to negotiate in good faith or that they have colluded or otherwise acted improperly. (*See* Pet. at 28-29.) The parties, including the Attorney General, have continued to meet, to talk, and to make proposals. The *fact* is that these activities have continued to date under the aegis of the court-appointed settlement coordinator. Indeed, in November, the same month in which the State filed its certiorari petition, the Attorney General also wrote to the parties and made a public statement declaring his support for the settlement process. Dale Singer, *Nixon withdraws offer on desegregation settlement,* St. Louis Post-Dispatch, Nov. 7, 1997 ("I look forward to hearing settlement offers from the others involved in the case. I will work with the court-appointed settlement coordinator to reach a resolution to the case that is in the best interest of the children.") (statement of Missouri Attorney General Jay Nixon). *See also* Letter to Counsel from Jay Nixon and John R. Munich of Nov. 7, 1997.

The Decision of the Court of Appeals

Just as petitioners have mischaracterized the facts and prior proceedings and the settlement negotiations in this case, they have misstated the holding of the court of appeals.

The court of appeals did *not* "rule[] that the district court had properly declined to phase out the interdistrict busing program [sic] because *Jenkins III* does not cast doubt on the propriety of imposing interdistrict remedies

to address intradistrict violations." (Pet. at 11.) As more fully discussed *infra,* nothing the court of appeals said in its opinion even created an inference of such a holding.

Rather, the court, after a brief description of the background of the case including the barrage of motions filed by petitioners attacking the settlement process (Pet. App. at 4a-11a), did the following: First, it held that the district court did not abuse its discretion in keeping the existing remedy in place while settlement negotiations were ongoing. In doing so, the panel noted the principles of law favoring settlement, particularly in school desegregation cases, and the factors supporting the district court's exercise of equitable discretion to permit the remedies to continue while negotiations took place. (Pet. App. at 13a-16a.) The opinion also rejected petitioners' claim of an "impasse" as without factual basis (Pet. App. at 13a.)

Second, in dicta, the court provided some guidance to the district court on what factors, in the light of this Court's decisions, should govern the district court in making a decision on unitary status if it determines that "an impasse in the settlement negotiation has been reached." (Pet. App. at 16a-18a.)

Finally, responding to petitioners' claim that this Court's decision in *Jenkins* left the district court no option but to terminate the VITP immediately, the court pointed out relevant differences between that case and this, notably the fact that the existence of an interdistrict violation had never been litigated in St. Louis. The court added that the initial determination of an interdistrict violation would properly be made by the district court and that it would be unfair to plaintiffs "if they were denied the opportunity to prove interdistrict violations," should negotiations fail and it were decided that such proof was necessary to sustain the VITP. (Pet. App. at 19a-21a.) Without reaching a decision on the ultimate issues, and in light both of

prior decisions upholding the duty of the State to fund the VITP and of the ongoing settlement negotiations concerning the VITP and other remedies, the court concluded that *Jenkins* did not mandate termination or phase-out of the VITP and of the ongoing settlement negotiations concern- cited in Pet. App. at 4a-5a n.1.

SUMMARY OF ARGUMENT

Petitioners should not be permitted through this petition to short-circuit the settlement process initiated by the district court. Their demand for review cannot be squared with legal principles that vest broad discretion in trial courts to manage their own dockets and that strongly favor settlement in school desegregation cases and other litigation of this magnitude. *See, e.g., Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1383 (8th Cir. 1990). Petitioners' contention that settlement talks are at an impasse is not supported by either the settlement coordinator or the trial judge and is contradicted by petitioners' own contemporaneous statements treating the settlement talks as a live process.

Further reasons for denial of the petition include the fact that the remedy sought—refusing entry into the interdistrict desegregation program for the 1997-98 school year—is now moot since students have been enrolled and are attending school. Nor does this come within an exception to the mootness rule: a properly presented claim for termination of the program would not evade future review.

Petitioners have also failed to meet this Court's basic criteria for grant of certiorari. However the underlying issues may be characterized, the decision below contemplated further proceedings and did not resolve an issue of national importance. Nor does the case present any conflict between circuits. Petitioners' transparent effort to

manufacture such a conflict depends entirely on mischaracterizing and distorting the holding of the court of appeals. That court below has continually recognized and acted in accordance with the controlling authority of *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974), and did *not* rule that interdistrict remedies could be imposed in the absence of an interdistrict violation. Rather, the court properly recognized that it would be inappropriate for an appellate court to make an initial determination concerning the existence of an interdistrict violation and set forth an orderly process for resolving the question.

By denying the petition, this Court will give the settlement process an opportunity to work and insure that if it fails the process for adjudicating unresolved legal issues will be orderly and fair.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. CERTIORARI SHOULD BE DENIED BECAUSE THE PETITION PREMATURELY SEEKS TO TERMINATE COURT-ORDERED SETTLEMENT NEGOTIATIONS ON A KEY COMPONENT OF THE CURRENT REMEDY.

Virtually from the moment that the district court appointed a settlement coordinator in an effort to resolve the remaining issues in this case through negotiations, petitioners have sought to short-circuit the settlement process. They have unsuccessfully challenged the objectivity of Dr. Danforth, the settlement coordinator, an effort renewed here; treated their own evidence offered at the hearing on unitary status as conclusive; and have sought to have the courts below unilaterally terminate the remedy without any further proceedings. (*See* Statement, *supra* at 8-11.) In their current request for certiorari, petitioners seek to resurrect a motion to invalidate the remedy that they had earlier asked the district court to consider *only after* a determination is made on unitary status. (*See* Statement, *supra* at 7-8.)

All of these efforts run afoul of the strong preference that the law accords to the voluntary settlement of civil litigation. *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910). As the court below found, the preference for resolution through settlement may be particularly strong in school desegregation cases, which are often protracted and divisive and in which lasting solutions depend on the cooperation of all the parties. (*See* Pet. App. at 13a-14a.) *See also Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1,* 921 F.2d 1371, 1383 (8th Cir. 1990); *Armstrong v. Bd. of School Dirs.,* 616 F.2d 305, 313 (7th Cir. 1980); *Parents for Quality Educ. with Integration v. Fort Wayne Community Schs. Corp.,* 728 F. Supp. 1373, 1374 (N.D. Ind. 1990); *Bronson v. Board of Educ.,* 604 F. Supp. 68 (S.D. Ohio 1984).

The authority of district courts to initiate a settlement process and to effectively stay further litigation pending the outcome of the negotiations is part of the court's broad discretion over case management which includes "the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31 (1962).

Petitioners seek to avoid the dispositive effect of these principles on their request for review by proclaiming that the negotiations have reached an impasse, a conclusion they reach by misstating the position of respondents (*see* Statement, *supra* at 15-16) and characterizing them as making "patently unreasonable demands." (Pet. at 28-29.) As the court of appeals correctly pointed out, this assertion of an impasse was not supported by any finding of the settlement coordinator or the district court and was contradicted by the other parties. (Pet. App. at 13a.)

Since the court of appeals decision on September 25, 1997, two events have further undermined petitioners' claim of an impasse. On January 5, 1998 the Caldwell and Liddell plaintiffs and the City Board defendants an-

nounced a joint agreement to redeploy resources used for educational improvement, including provisions to reconstitute schools where students were failing to make progress. (Statement, *supra* at 13.) The agreement was reached after months of negotiations conducted under the aegis of Dr. Danforth, the settlement coordinator. The parties also announced that they would make further efforts to supplement the agreement so that it might be incorporated into a more comprehensive order.

Equally as important, in November, 1997, petitioners wrote to the other parties soliciting their proposals for settlement and stating a determination to work with the court-appointed settlement process to resolve the case. (Statement, *supra* at 15.) The Attorney General also announced his position publicly. (*Id.*) There can be no doubt that these statements treated the settlement discussions as a live and ongoing process. Petitioners' unilateral declaration of an impasse in a certiorari petition filed the same month totally contradicts their own statements and is not credible.

II. CERTIORARI SHOULD BE DENIED ON GROUNDS OF MOOTNESS BECAUSE THE ACT SOUGHT TO BE ENJOINED BY PETITIONERS HAS ALREADY OCCURRED.

The motion filed by petitioners was quite specific. As the court of appeals said, the State "appeals from an April 10, 1997 order of the [district court] . . . denying the State's motion to end all efforts to recruit and admit new students into the voluntary interdistrict transfer plan (VITP) *for the 1997-98 school year.*" (Pet. App. at 4a) (emphasis supplied). So, too, the order of the court of appeals was specific: "we affirm the order of the district court denying the State's motion to end all efforts to recruit and admit new students into the VITP *for the 1997-98 school year.*" (Pet. App. at 21a) (emphasis supplied).

Federal court jurisdiction requires, of course, that at all stages of adjudication including appellate review there

must be an actual, live controversy in which the parties have a legally cognizable interest in the outcome. *See, e.g., Honig v. Doe,* 484 U.S. 305, 317 (1988); *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980). This Court requires that a live controversy exist at the time the case is before it, not just at the time of filing. *See, e.g., DeFunis v. Odegaard,* 416 U.S. 312, 319 (1974); *Board of License Commr's v. Pastore,* 469 U.S. 238 (1985) (per curiam). *See also,* Erwin Chemerinsky, *Federal Jurisdiction* § 2.5.1 at 125 (2d ed. 1994).

Where, as here, the relief sought is an injunction, the mootness doctrine requires a court to ask whether the act sought to be enjoined already has occurred. *See* Robert L. Stern et al., *Supreme Court Practice* 712 (6th ed. 1986). So, for example, an effort to enjoin the holding of an election will become moot once the election is held. *Hall v. Beals,* 396 U.S. 45, 48 (1969) (per curiam) (finding that because the election has been held "[t]he case has therefore lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law"). That is precisely the situation here. Once new students were admitted and began attending school in the voluntary interdistrict transfer program, the relief sought by petitioners' could no longer be afforded and the case lost its character as a present, live controversy.

Nor does this case come within the exception to the mootness doctrine as presenting an issue that is capable of repetition but evades review. As petitioners make plain throughout their request for certiorari, their ultimate objective is not simply to end the entry of new students into the voluntary transfer program but to terminate the program in its entirety on grounds that it has been rendered invalid by a change in decisional law. Why petitioners chose to limit their request for relief to new entrants is a matter on which other parties can only speculate. The important point is that the underlying issue will not evade review. Petitioners may appropriately raise it anew if

settlement efforts fail and, if they do so, there will be no mootness bar to its consideration by appellate courts.

III. THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE COURT'S BASIC CRITERIA FOR GRANT OF CERTIORARI.

This Court generally limits the exercise of its discretionary jurisdiction to the following situations: (1) the case involves an important question, (2) the case permits the court to resolve a circuit split, (3) the case would resolve a dispute between federal and state courts, or (4) the case implicates a matter affecting national interests. *See* Sup. Ct. R. 10; *Forsyth v. Hammond*, 166 U.S. 506, 513-515 (1897); Charles Alan Wright et al., 17 *Federal Practice and Procedure* § 4034 (2d ed. 1988). The petition in this case meets none of the criteria.

A. There Is No Conflict Among the Circuits.

Apparently aware of the need to state a credible basis for this Court's review, petitioners seek to manufacture a conflict among circuits by claiming that the Eighth Circuit is the only circuit not to recognize the need for an interdistrict violation as a predicate for an interdistrict remedy (Pet. at 23.) In order to create such a conflict, petitioners claim that the Eighth Circuit ruled that "an interdistrict violation is not a prerequisite for interdistrict relief." (Pet. at 13.) Such a holding would create a conflict with this Court's holding in *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

But petitioners' claim is a complete fabrication; one searches the opinion below for anything approximating such a holding.[6] In fact, what the opinion below did do

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[6] It would be most curious if the court below were to repudiate *Milliken I* in any way since both the panel and the full circuit have consistently recognized the authority of *Milliken* in all prior stages of this litigation. *See, e.g., Liddell v. Missouri (Liddell VII)*, 731 F.2d 1294, 1304 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816

(in response to the petitioners' claim that *Jenkins* required immediate termination of the remedy) was to set out some of the material differences between the *Jenkins*[7] case and this case, noting in particular that in *Jenkins* there was a federal judgment that no interdistrict violation had ever occurred, while in this case such a determination had never been made because of the settlement and subsequent consent decree. (Pet. App. at 19a-21a.)[8] If a change in the decisional law operates to invalidate or impair the original settlement agreement and orders, the court below suggested that plaintiffs would be entitled to litigate their interdistrict claims. It would be inappropriate, the court of appeals wrote, "for this court to make an initial determination with respect to [the existence of] an interdistrict violation." (Pet. App. at 19a.) This is a far cry from a holding that an interdistrict remedy need not be predicated on an interdistrict violation.

Petitioners then seek to counter the need for a trial court hearing on the existence of an interdistrict remedy; they suggest that twelve years is long enough and that the parties have no due process right to retain State funding. (Pet. at 18.) This argument too misses the point. Assuming, *arguendo* that the petitioners present a valid claim under Federal Rule of Civil Procedure 60(b), the Court would apply equitable principles in resolving the case. *See Associates Discount Corp. v. Goldman*, 524 F.2d

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(1984); *Liddell v. Board of Educ.*, 677 F.2d 626, 641 (8th Cir.), *cert. denied*, 459 U.S. 877 (1982); *Adams v. United States*, 620 F.2d 1277, 1294 n.27 (8th Cir.) (en banc), *cert. denied*, 449 U.S. 826 (1980).

[7] *Missouri v. Jenkins*, 515 U.S. 70 (1995).

[8] The settlement among all parties except the State defendants was entered as a consent decree after a fairness hearing. *Liddell v. Board of Educ.*, 567 F. Supp. 1037 (E.D. Mo. 1983). State defendants were included in the remedy based on prior findings concerning constitutional wrongdoing and on the Eighth Circuit's reading of this Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976). *Liddell VII*, 731 F.2d at 1305-09. This Court denied review. 469 U.S. 816 (1984).

1051, 1054 (3d Cir. 1975) ("It is clear that equitable principles apply to the resolution of the issue in 60(b) cases."); *DiVito v. Fidelity Deposit Ins. Co.*, 361 F.2d 936, 939 (7th Cir. 1966) ("the relief provided by Rule 60(b) is equitable in character and to be administered upon equitable principles"); Wright, *supra* § 2857 at 255.

One of those equitable principles is that if two possible bases exist for an injunction, even if the stated ground for the injunction is invalidated, the alternate ground may support continuance of injunctive relief. *See Sunbeam Corp. v. Charles Appliances, Inc.*, 119 F. Supp. 492 (S.D.N.Y. 1953). So, even if petitioners persuaded the district court that a change in the decisional law undermined the original injunction, proof of an interdistrict violation would support the continuance of injunctive relief.[9]

Moreover, the decision of this Court in *Dayton I* strongly supports a decision that would keep injunctive relief in effect while hearings are held to determine whether there is an adequate alternate basis for relief (*i.e.*, an interdistrict violation). As Justice Rehnquist wrote for the Court, after finding that the basis proffered for a comprehensive school desegregation remedy by the courts below was inadequate, "we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearing mandated by this opinion." *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 421 (1977). *Accord, United States v. School Dist. of Omaha*, 565 F.2d 127, 128 (8th Cir. 1977) (per curiam).[10]

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[9] Not one of the cases cited by petitioners (Pet. at 18-19) to bolster their position that the court below should have summarily vacated the injunction holds or even hints that plaintiffs have no right to litigate their claims or that a court ought not to consider alternative bases for injunctive relief.

[10] At a minimum, the courts below would apply equitable considerations such as the likelihood that plaintiffs would prevail and the gravity of irreparable harm asserted by the parties. In a hearing

In sum, far from issuing "sweeping orders" or defying this Court's decision in *Milliken I*, the Court below issued a careful, nuanced opinion setting forth proper procedures for the adjudication of claims that may remain after the settlement process is completed. The decision created no division in the circuits.

B. There Is No Other Basis for a Grant of Certiorari.

Petitioners do not explicitly invoke any of the other bases for a grant of certiorari. It may be inferred that their plea for a vindication of "federalism and separation-of-powers concerns" (Pet. at 26) is intended to suggest that this case implicates a matter affecting national interests.[11] But these arguments, like petitioners' claim that there is a circuit split, are predicated on a total mischaracterization of the holding of the court below. It is conceivable that an important question regarding the responsibility of the State may arise in the future. But such a question would properly occur only if the case is not set-

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held by the district court the State could appropriately document its passionate argument that "staggering" costs of the remedy impose irreparable harm on petitioners (Pet. at 21-22), outweighing any continuing harm to black school children stemming from the State's imposition of unconstitutional segregation for more than a quarter of a century after the *Brown* decision. *See Liddell v. Board of Educ.*, 491 F. Supp. 351, 357, 359-60 (E.D. Mo. 1980), *aff'd*, 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081 (1981). The State can also seek in that proceeding to document its claim that the vestiges of segregation have been eliminated by the interdistrict remedy adopted in 1984 and that desegregation is no longer needed. All of these claims would be properly weighed along with the claims of other parties.

[11] Petitioners' arguments in this section (Pet. at 26-30) are a grabbag of non sequiturs and misstatements. They invoke the "vital national tradition of local autonomy of school districts" (Pet. at 27) without acknowledging that all of the school districts in the case oppose the State's effort to terminate the remedy. They baldly and falsely assert collusion between plaintiffs and school districts (Pet. at 26) without acknowledging that no such finding has ever been made and that at the fairness hearing the district court explicitly noted that no party or objector made any claim of collusion. (Statement, *supra* at 14.)

tled and after determinations by the courts below concerning the applicability to this case of *Hills* as interpreted by *Jenkins* and the existence of an interdistrict violation.

CONCLUSION

With a court-ordered settlement process that is well underway, and with important factual determinations still to be made if settlement negotiations fail, this is a most appropriate case for application of the principles of *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955). Because of its "proximity to local conditions," the trial court can best perform the judicial functions called for at this stage of the proceedings. There is no reason at this point to doubt that the outcome will be marked by a "practical flexibility" and a "facility for adjusting and reconciling public and private needs." *Id.* at 298-99.

For the reasons stated above the petition for a writ of certiorari should be denied.

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No. 97-888

In the Supreme Court of the United States

OCTOBER TERM, 1997

MISSOURI, ET AL., PETITIONERS

v.

MICHAEL C. LIDDELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion to suspend the recruitment and entry of new students into the Voluntary Interdistrict Transfer Program for the 1997-1998 school year.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 126 F.3d 1049.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1997. The petition for a writ of certiorari was filed on November 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972, suit was filed against the Board of Education of the City of St. Louis, alleging racial segregation in the city's schools in violation of the Fourteenth Amendment. Pet. App. 5a. The United States intervened as a plaintiff and the State of

Missouri (petitioner) was joined as a defendant. *Ibid.* After a trial, the district court found no constitutional violation. *Ibid.* Finding that petitioner and the City were jointly liable for creating and maintaining a segregated school system, the court of appeals reversed and remanded for the implementation of a remedy. *Ibid.*

On remand, the district court ordered the implementation of a mandatory desegregation plan within the city schools with funding to be shared equally by the City Board and petitioner. Pet. App. 5a. The district court also ordered petitioner, the United States, and the St. Louis Board of Education:

> To make every feasible effort to work out with the appropriate school districts in the St. Louis County and develop, for 1980-81 implementation, a voluntary, cooperative plan of pupil exchanges which will assist in alleviating the school segregation in the City of St. Louis, and which also insures that interdistrict pupil transfers will not impair the desegregation of the St. Louis school district ordered herein. * * *

Id at 6a. The court of appeals affirmed. *Ibid.*

2. In 1981, the district court added the St. Louis County school districts and County officials as defendants. Pet. App. 7a. The district court scheduled a hearing on interdistrict liability. *Ibid.* Before that hearing was held, the City Board, the Liddell and Caldwell respondents, and all of the County school districts entered into a settlement agreement. *Ibid.* The agreement provided for voluntary interdistrict transfers between city and county schools, and included fiscal incentives to encourage those transfers. *Ibid.* The district court approved the voluntary inter-

district transfer program (VITP). *Id.* at 7a-8a. Petitioner, as the "primary constitutional violator," was ordered to fund the VITP. *Id.* at 8a. The court of appeals affirmed the remedy. *Ibid.*

3. Petitioner subsequently filed three different motions for unitary status. Pet. App. 9a. A hearing on the third motion was scheduled for March 1996. *Id.* at 10a. Two months before the scheduled hearing, petitioner filed a motion to terminate the VITP on the basis of this Court's decision in *Missouri* v. *Jenkins* (*Jenkins III*), 515 U.S. 70 (1995). Pet. App. 10a. Petitioner described its motion as "conditional" because it wanted the court to decide the motion only if the court did not enter a finding of unitary status. *Ibid.* The district court denied petitioner's conditional motion as premature. *Ibid.*

In March 1996, the district court conducted a three-week unitary status hearing. Pet. App. 11a. Following the hearing, the district court appointed Dr. William H. Danforth, former Chancellor of Washington University of St. Louis, as a settlement coordinator. *Ibid.* The district court gave Dr. Danforth broad powers to further negotiations and directed the parties and their counsel to attend settlement meetings and to participate in the negotiations in good faith. *Ibid.* The court also ordered that "all components of the settlement agreement now in force shall continue as they are currently operating." *Ibid.* The court subsequently ordered that settlement negotiations should be kept confidential. *Ibid.* The court refused to set a time limit for the parties to conclude negotiations, stating that it was confident that the settlement coordinator would proceed expeditiously. *Ibid.*

Petitioner appealed the orders referring the case to the settlement coordinator, and sought a stay of the

transfer order pending appeal. Pet. App. 11a. The district court, the court of appeals, and Justice Thomas denied petitioner's motions for a stay pending appeal. *Ibid.* The court of appeals then dismissed petitioner's appeal for lack of jurisdiction. *Id.* at 11a-12a.

4. a. In March 1997, petitioner filed the motion at issue here. Pet. App. 12a. That motion sought an end to all efforts to recruit and admit new students into the VITP for the 1997-1998 school year and to relieve petitioner from any funding obligation with respect to those students. *Id.* at 3a-4a, 12a-13a. In support of that motion, petitioner argued that the order requiring funding of the VITP violates *Jenkins III*. *Id.* at 12a. The remaining parties opposed the motion, arguing, *inter alia*, that the settlement process should be permitted to run its course and that it was too late to end new transfers to the VITP for the 1997-1998 school year without causing significant disruption to parents, students, and staff. *Id.* at 12a n.6. The district court denied the motion "[f]or the reasons set forth in [the opposing parties'] responses." *Id.* at 23a. Petitioner's motion for a stay was denied by the district court, the court of appeals, the en banc court, and Justice Thomas.

b. The court of appeals affirmed. Pet. App. 1a-22a. The court held that, "[g]iven the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying [petitioner's] motion to phase out the voluntary transfer of black city students to county districts pending settlement negotiations." *Id.* at 4a. The court "encourage[d] the parties to proceed

diligently with their negotiations," and it concluded "that the settlement coordinator should be permitted to complete this important assignment." *Ibid.* The court made clear that, if the settlement discussions were to reach an impasse, the district court should promptly decide petitioner's motion to have the St. Louis City School District declared unitary. *Id.* at 16a.

The court rejected petitioner's contention that *Jenkins III* removed the district court's discretion to permit the enrollment of new students into the interdistrict transfer program pending the outcome of settlement discussions. Pet. App. 19a-21a. The court explained that "[a] premise of *Jenkins III* was that the trial court specifically found that no interdistrict violation had taken place," while "[n]o such determination has been made here." *Id.* at 19a. The court further noted that "the plaintiffs asserted interdistrict violations," and "[r]ather than contest these allegations, the County Districts entered into a settlement agreement." *Ibid.* The court refused to "make an initial determination with respect to an interdistrict violation," because "[m]aking such a determination would invade the province of the district court and would be unfair to the parties by denying them the opportunity, should it become necessary, to litigate the interdistrict violation issue." *Ibid.* The court therefore "affirm[ed] the order of the district court denying [petitioner's] motion to end all efforts to recruit and admit new students into the VITP for the 1997-98 school year." *Id.* at 21a.

ARGUMENT

Petitioner contends (Pet. 28) that review is warranted in this case because the court below "definitively held that, despite *Jenkins III*, the interdistrict remedies imposed on the State are a valid means of redressing the State's adjudged intradistrict violation." Petitioner, however, has mischaracterized the court of appeals' holding. The court's limited and unexceptional holding was that, given the pending settlement discussions, and the existence of unresolved allegations of an interdistrict violation, the district court did not abuse its discretion in denying petitioner's motion to prevent new students from entering the VITP for the 1997-1998 school year. That holding is correct and does not raise any issue of general importance. In any event, because the students at issue have now been admitted into the VITP, and the school year is more than half over, petitioner's request for relief is moot. Review by this Court is therefore not warranted.

1. The court of appeals articulated its narrow holding as follows: "Given the long history of state-mandated, segregated schools, the complexity of the issues, and the difficulty of developing a plan that will ensure that students of all races will have a continuing equal opportunity for a quality, integrated education, the district court did not abuse its discretion in denying [petitioner's] motion to phase out the voluntary transfer of black city students to county districts *pending settlement negotiations*." Pet. App. 4a (emphasis added). The court "encourage[d] the parties to proceed diligently with their negotiations," and concluded that "the settlement coordinator should be permitted to complete this important assignment."

Ibid. The court also carefully explained why *Jenkins III* did not preclude the district court from leaving the VITP in place pending the outcome of settlement discussions. In particular, the court emphasized that "the plaintiffs [had] asserted interdistrict violations" and the district court had made no "determination" with respect to those allegations. *Id.* at 19a. The court rejected the invitation to resolve that issue itself, on the ground that "[m]aking such a determination would invade the province of the district court and would be unfair to the parties by denying them the opportunity, should it become necessary, to litigate the interdistrict violation issue." *Ibid.*

Thus, the court of appeals grounded its affirmance of the district court's order permitting the enrollment of new students in the VITP for an additional school year on two salient factors: the pendency of ongoing settlement discussions and the existence of unresolved allegations of *inter*district violations. Contrary to petitioner's contention (Pet. 28), the court did not hold that the VITP is an appropriate remedy for an *intra*district violation.

Given the narrow basis of the court of appeals' decision, petitioner errs in contending (Pet. 12) that the decision below conflicts with *Jenkins III*. In *Jenkins III*, this Court held that "a district court seeking to remedy an *intra*district violation that has not 'directly caused' significant interdistrict effects, exceeds its remedial authority if it orders a remedy with an interdistrict purpose." 515 U.S. at 97 (citation omitted). *Jenkins III* did not purport to address the very different question presented in this case—whether a district court may leave an existing remedy having an interdistrict component in place for one additional school year, when there are ongoing settle-

ment discussions concerning that remedy and when there are untried allegations of an interdistrict violation that could justify the remedy. There is therefore no conflict between *Jenkins III* and the decision below.*

2. The court of appeals' limited holding in this case does not warrant review by this Court. The question whether the district court abused its discretion in refusing to suspend the VITP for the 1997-1998 school year in light of pending settlement negotiations and untried allegations of interdistrict violations is fact-bound and does not raise any issue of general importance.

In any event, the court of appeals correctly resolved that narrow issue. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 419 (1977), is instructive on that point. In *Dayton*, the Court held that the court of appeals had erred in imposing a systemwide desegregation plan based on findings of three isolated constitutional violations. *Id.* at 417. The Court reversed and remanded to the district court for supplemental findings of fact and, if necessary, the taking of additional evidence. *Id.* at 419. Significantly, the Court ordered that the systemwide desegregation plan should re-

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* The court below suggested that it is an "open" question whether *Jenkins III* necessarily forecloses an argument that the VITP is an appropriate remedy for the violation found in this case. Pet. App. 20a-21a. That discussion of *Jenkins III*, however, was not essential to the court's judgment, and, in any event, does not remotely support petitioner's assertion (Pet. 28) that the court below "definitively held that, despite *Jenkins III*, the interdistrict remedies imposed on the State are a valid means of redressing the State's adjudged intradistrict violation."

main in place pending the outcome of the proceedings on remand. *Id.* at 421. The Court explained:

> While we have found that the plan implicitly, if not explicitly, imposed by the Court of Appeals was erroneous on the present state of the record, it is undisputed that it has been in effect in the Dayton school system during the present year without creating serious problems. While a school board and a school constituency which attempt to comply with a plan to the best of their ability should not be penalized, we think that the plan finally adopted by the District Court should remain in effect for the coming school year subject to such further orders of the District Court as it may find warranted following the hearings mandated by this opinion.

Ibid.

Dayton establishes that, even when a remedy is not supported by existing findings, a court has discretion to leave the remedy in place pending the outcome of further proceedings aimed at determining what remedy is appropriate. The principal distinction between the present case and *Dayton* is that there are ongoing settlement discussions here. If anything, however, that factor provides even greater justification for leaving an existing remedy in place. See *Williams* v. *First Nat'l Bank*, 216 U.S. 582, 595 (1910) (the law favors settlement of civil litigation).

That is particularly true on the facts of this case. The district court has entrusted the settlement process to a distinguished settlement coordinator and has equipped that coordinator with ample power to assist the parties in reaching a settlement. Pet. App. 11a. The court below also made clear that, if the

settlement discussions should reach an impasse, the district court must promptly resolve petitioner's pending motion for unitary status. *Id.* at 16a. In those circumstances, the district court acted well within its discretion in denying petitioner's motion to prevent new entrants into the VITP for the 1997-1998 school year.

3. Review is also unwarranted in this case because petitioner's request for relief is now moot. Petitioner's motion requested only that the district court suspend the entry of new students into the VITP for the 1997-1998 school year; the motion did not request relief for any other school year. C.A. App. 114 ("The Court should enter an order, pursuant to Fed. R. Civ. P. 60, modifying its previous orders in this case to ensure that no new children be enrolled in the VIDT program for the upcoming 1997-98 school year, that all parties to this action and all advisory panels be prohibited from taking any steps to recruit and enroll new students into the VIDT program for the upcoming school year, and clarifying that the State has no financial obligation as to such students."). Petitioner deliberately framed its motion in that way, because it wished to continue to participate in settlement discussions concerning all other aspects of the VITP. *Id.* at 109 n.3. The district court denied petitioner's motion in the terms in which it was presented, Pet. App. 23a, and the court of appeals' affirmance was similarly limited, *id.* at 21a. The court of appeals specifically stated that "[w]e affirm the order of the district court denying the State's motion to end all efforts to recruit and admit new students into the VITP for the 1997-98 school year." *Ibid.*

Events have now overtaken petitioner's request to prevent the admission of new students into the VITP

for the 1997-1998 school year. All students seeking entry into the VITP program for the 1997-1998 school year have now been admitted, the school year is more than half over, and petitioner does not suggest that it would seek to remove the new entrants from the program at this late date—let alone at the time when a decision by this Court would ordinarily be anticipated. Petitioner's motion to prevent the admission of new students into the VITP for the 1997-1998 school year is therefore moot. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974) (per curiam) (challenge to race-based admission program held moot where student challenging the program had registered for his final semester and the university represented that it would not seek to abrogate that registration).

Nor does this case fall within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). While the issue petitioner seeks to raise is capable of repetition, it would not necessarily evade review in the future. For example, petitioner could obtain review in the future by seeking to preclude any new entrants into the VITP, not just entrants for a particular year. As a matter of litigation strategy, however, petitioner chose to limit its request to a single school year. The consequence of that strategy is that petitioner's request for relief is moot. See *Brockington* v. *Rhodes*, 396 U.S. 41, 43-44 (1969) (per curiam) (mootness found based on the limited relief sought).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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OCTOBER TERM, 1997

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

CRATON LIDDELL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF FOR PETITIONERS

This Court's docket is replete with cases presenting close legal questions. This case of clear national importance, however, is not one of them. Given the admitted absence of *any* "determination with respect to an interdistrict violation" (Pet. App. 19a)—not to mention *any* record evidence of such a violation—this Court's decision in *Missouri* v. *Jenkins*, 515 U.S. 70 (1995) ("*Jenkins III*"), compels the conclusion that the courts below have no power under the Constitution to require the State of Missouri to fund interdistrict busing efforts between St. Louis and neighboring suburban school districts. The Eighth Circuit's extraordinary decision cries out for this Court to intervene in defense of the federalism interests vitiated by the courts below for almost two decades. Unless this Court is to turn a blind eye to the principles reaffirmed in *Jenkins III*, a writ of certiorari should issue.

1. Rather than mount a serious defense of the ruling below under *Jenkins III*, respondents argue that the admission of new students last Fall into the interdistrict program mooted this proceeding because the State's motion "requested only that the district court suspend the entry of new students into the VITP for the 1997-98 school year." U.S. Opp. 10.[1] These assertions are wrong.

The issues presented in this hotly-contested case remain "live" and are of paramount interest to the State and all of its citizens—who have been saddled for nearly 20 years with funding extraordinary interdistrict activities in St. Louis at a weekly cost of $2 million and a cumulative cost to date of more than $1 billion. Contrary to re-

[1] *See also* Brief in Opposition of Michael Liddell, *et al.*, and the National Association for the Advancement of Colored People (hereinafter NAACP Opp.) 20-22; Brief in Opposition of the Board of Education of the City of St. Louis (hereinafter Bd. Opp.) 22-24. The State's motion appears at the end of the Board's Opposition.

spondents' false claim that petitioners' motion merely sought to bar new entrants during 1997-98, the motion explicitly requested two additional forms of relief: (1) cessation of "any steps to recruit and enroll new students into the VIDT program for [that] school year"; and (2) a declaration clarifying that "the State has no financial obligation as to such students." Both forms of relief remain available.[2] The continued availability of some form of relief is "sufficient to prevent this case from being moot."[3] *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992).

2. Respondents' arguments on the merits are equally erroneous. Although the Petition carefully documents the patent inconsistency between the decision below and *Jenkins III* and its antecedents (Pet. 12-13) and decisions of other Circuits (Pet. 23-26), respondents argue that the

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[2] Respondents cannot (and do not) deny that the State continues, under compulsion of court order, to expend resources recruiting and enrolling new students into the program for the current year. Also, petitioners' requested declaration, although limited to students who enrolled during 1997-98, was *not* limited to the 1997-98 school year. The State explicitly sought an order rejecting respondents' "united position that once enrolled in the program, every VIDT child is absolutely entitled to continue through the program through graduation, even *after* this Court declares the SLPS unitary." Thus, the declaration sought relief for up to twelve years into the future (in the case of a new student entering the VIDT in 1997-98 as a first-grader) for all new students admitted to the program in 1997.

[3] Respondents' analogy to cases in which parties plaintiff sought injunctions compelling action that had already been taken by the time of appeal (U.S. Opp. 11) or barring conduct that had already occurred (NAACP Opp. 21; Bd. Opp. 22) is strained indeed. Despite respondents' assertions that "the relief sought [by petitioners] is an injunction" (NAACP Opp. 21; *see also* Bd. Opp. 22), petitioners sought not an injunction, but the modification of an injunction *against them* pursuant to Fed. R. Civ. P. 60(b). In any event, mootness on appeal provides a reason to grant, not deny, certiorari. *See, e.g., U.S. Bancorp Mtge. Co.* v. *Bonner Mall Ptnrshp.*, 513 U.S. 18, 23-25 (1994) (judgment should be vacated if appeal becomes moot through happenstance or conduct of appellees).

Eighth Circuit's opinion did not mean what it so plainly held. They also argue that, under *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), the court below had the discretion to leave the interdistrict remedy in place indefinitely without the findings required by *Jenkins III*. Both claims are wrong.

a. Respondents' disingenuous attempts to deny the obvious holding of the Eighth Circuit merit only brief attention here, for they are refuted by the opinion itself (Pet. App. 1a-22a). The constant refrain of respondents here is that "[t]he court of appeals merely held that until [settlement] negotiations are complete, the district court was within its discretion in temporarily maintaining the remedy" (Bd. Opp. 2; see also U.S. Opp. 6). Such claims simply cannot be made in good faith.

The question of whether it was an abuse of discretion to continue the interdistrict funding orders in effect pending proceedings before the Settlement Coordinator was addressed in the first section of the court's discussion, entitled, "The District Court Did Not Abuse Its Discretion in Denying the State's Motion to Phase Out the VITP." Pet. App. 13a. The court of appeals, however, did not end its opinion there, as respondents falsely imply. Instead, two sections later in its opinion, under the heading, "The *Jenkins III* Issue," the court confronted what it correctly termed "[t]he State's principal argument," *i.e.*, "that the district court is without discretion in this matter and that *Jenkins III* requires that the VITP be phased out now."[4] Pet. App. 19a.

The Eighth Circuit rejected that argument with a purported distinction of *Jenkins III* on two entirely specious

[4] Thus, the court below addressed two discrete issues: (1) whether *Jenkins III* bars interdistrict relief absent proven interdistrict violations (Pet. App. 19a-21a); and (2) whether, assuming *Jenkins III* interposes no such bar, the district court abused its discretion in maintaining the interdistrict funding orders pending the outcome of proceedings before the Settlement Coordinator (*id.* 13a-16a). Only the first issue is presented here.

grounds (Pet. 16-17): (1) *Jenkins III* is limited to cases where the interdistrict remedy in question is intended to promote the " 'desegregative attractiveness' " of city schools in other districts or " 'suburban comparability' " (Pet. App. 20a); and (2) *Jenkins III* forbids interdistrict relief only where the "trial court [has] specifically found that no interdistrict violation had taken place" (*id.* 19a). It was these purely legal conclusions that led the court below to "follow [its] numerous precedents" upholding the interdistrict funding orders despite *Jenkins III*'s reaffirmance of the self-described "holding" in *Milliken I*, *Milliken* v. *Bradley*, 418 U.S. 717, 752 (1974), that "absent an interdistrict violation, there is no basis for an interdistrict remedy." [5]

Having made no attempt to defend the contrived distinctions of *Jenkins III* offered below, or to dispute that other Circuits have ruled that an adjudged interdistrict violation is a constitutional prerequisite to interdistrict relief, respondents proceed to misrepresent the ruling below. They nakedly assert that the court of appeals "did not" uphold the interdistrict funding orders as "an appropriate remedy for an *intra*district violation" (U.S. Opp. 7; see also NAACP Opp. 23). These puzzling assertions are foreclosed by the series of decisions issued by the court of appeals in this matter since 1980. As the en banc court unequivocally explained in *Liddell VII*: "This Court has repeatedly authorized the interdistrict transfer of students as a fundamental element of an effective remedy *for the*

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[5] The NAACP respondents' claim that the Eighth Circuit has "consistently recognized the authority of *Milliken* [*I*] in all prior stages of this litigation" (Opp. 22 n.6) is false. In *Liddell VII*, the en banc court ignored the findings requirement of *Milliken I*, following instead dicta in *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), that seemingly relaxed the rule of *Milliken I*. 731 F.2d at 1308; *see also Liddell V*, 677 F.2d 626, 630 (8th Cir. 1982) (citing *Hills* but not *Milliken I*). *Jenkins III* explicitly limited *Hills* to desegregation suits against federal agencies and reaffirmed *Milliken I* as controlling in cases involving States. 515 U.S. at 96-98; *contra* NAACP Opp. 25-26.

unconstitutional segregation of the city schools," i.e., as "an effective remedy *for the* [*State's*] *intradistrict violations.*" 731 F.2d at 1302 (emphasis added) (citing cases). The opinion below explicitly "follow[ed] [its] numerous precedents" in this regard after brushing aside the clear holding of *Jenkins III* to the contrary (Pet. App. 21a). Quite clearly, then, the court below *did* hold that "an interdistrict remedy need not be predicated on an interdistrict violation" (NAACP Opp. 23).[6] That holding flies in the face of *Jenkins III*, *Milliken I* and other controlling decisions from this Court, thereby warranting summary reversal, and has created a square Circuit split.

b. Respondents next argue that even if *Jenkins III* is to be honored, the constitutionally impermissible remedy upheld below should remain in place as long as further proceedings are taking place in this already decades-old case. Citing only a brief passage in *Dayton I* that this Court has never cited or relied upon, they assert that a court "has discretion to leave [such a] remedy in place pending the outcome of further proceedings aimed at determining what remedy is appropriate" (U.S. Opp. at 9). Putting aside the fact that this argument was not raised or adopted below, *Dayton I* simply will not bear the weight respondents place upon it. Although the necessary findings had not been made in *Dayton I* with the requisite level of specificity, the system-wide remedy question had *already* been the subject of extensive litigation and proofs, and so the necessary findings could be (and were) readily supplied on remand.[7] *Id.* at 419. The im-

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[6] Of course, even if the opinion below had not relied on that ground, the *Jenkins III* issue would, in light of the Eighth Circuit's prior rulings on that subject (*e.g.*, *Liddell VII*), nonetheless be properly presented here. It is hornbook law that legal issues decided at prior stages of a proceeding by a lower court can be reviewed in this Court, whether or not certiorari was sought at an earlier time. *See generally* R. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) (citing cases).

[7] Indeed, as then-Justice Rehnquist repeatedly noted in his majority opinion, the plaintiffs had cross-appealed urging that the district court "had erred in failing to make further findings tending to show

precision of the district court's findings left the Court unable to determine whether or not "the case for displacement of the local authorities" had been "satisfactorily established by factual proof." *Id.* at 410.

The state of the record here is quite the opposite. As the NAACP respondents admit, "the existence of an interdistrict violation ha[s] *never* been litigated in St. Louis" (Opp. 16 (emphasis added)). It thus is no surprise that the present record on the interdistrict liability question contains merely "unresolved allegations" (U.S. Opp. 7) and "untried allegations" (*id.* at 8), and the court of appeals therefore properly concluded that it "could not make a proper determination" of such liability (Pet. App. 20a).

Mere allegations of constitutional violations, not subjected to the rigors of the truth-finding process, are an insufficient basis for imposing or maintaining a coercive order against a State. This is why *Milliken I* explicitly set aside the interdistrict busing order issued in metropolitan Detroit where, as here, "there [wa]s no evidence in the record" that interdistrict violations had occurred. 418 U.S. at 748. Tellingly, respondents do not reconcile their tortured reading of *Dayton I* with *Milliken I*.

There is another critical distinction between this case and *Dayton I*, which respondents ignore. The stated purpose of the remand there, as correctly described by the NAACP respondents, was to permit the court "to determine whether there is an adequate alternative basis for relief," *i.e.*, a violation commensurate with the remedy ordered (Opp. 24; see also U.S. Opp. 9). See *Dayton I*, 433 U.S. at 419. Clearly, the purpose of the proceedings contemplated by the court of appeals below is *not* to determine whether interdistrict violations have occurred. Rather, those proceedings are designed to *avoid* any litigation or fact-finding on the all-important issue of inter-

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segregative actions" supportive of system-wide relief. *Id.* at 416; *see also Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 532 (1979) (remedy was left intact pending remand in *Dayton I* due to "the confusion evidenced at various stages of the proceedings regarding the scope of the violation established").

district liability. In fact, the court of appeals explicitly ruled (Pet. App. 19a) that it would be *unconstitutional* to conduct any litigation on that issue: "To require the County Districts to litigate this issue now, after voluntarily accepting thousands of city transfer students for twenty years, would violate their fundamental right to due process." [8] In light of this ruling, it is clear that no proceedings on interdistrict liability are contemplated (or even remotely possible) in this case. Leaving a constitutionally unsupported order against a State in place indefinitely, while proceedings are conducted for purposes other than deciding whether interdistrict violations have occurred, is not even remotely authorized by *Dayton I*.[9]

3. Finally, a few observations are in order regarding the most glaring of respondents' many misrepresentations of the procedural history of this case. The NAACP respondents (Opp. 7-8) and the City Board (Opp. 10-13) argue that the State itself is responsible for the protracted delays in this litigation. The argument is false. For the past seven years, the State's consistent efforts to end court supervision in St. Louis have been frustrated by court inaction based upon arguments by respondents that it is too early even to begin considering phasing out any aspect of the interdistrict program that the State has been compelled to fund in St. Louis for almost two decades.[10]

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[8] The City Board's attempt to deny the existence of this holding (Bd. Opp. 18 n.7) is pure sophistry so clearly refuted by the Eighth Circuit's opinion as to require no additional response.

[9] Contrary to the suggestion of the NAACP respondents (Opp. 24 n.9), petitioners have never challenged their right to proceed on claims that interdistrict violations occurred. Indeed, petitioners' view is that respondents *must* do so (and prevail) if they and their "friendly adversar[ies]" wish to "extract[] funds from the state treasury" for further interdistrict efforts. *Jenkins III*, 515 U.S. at 99-100. The short answer to the Board's desperate plea that it needs these funds (Opp. 20-21) comes from *Jenkins III*—"dependence on state funding" hardly justifies "continued supervision by the District Court." 515 U.S. at 99.

[10] For example, respondents conceal from the Court the fact that they responded to the State's 1991 unitary status motion with a

That this litigation has been unduly delayed through the machinations of respondents—who reap $2 million in court-ordered funding from the State for each week the litigation status quo is maintained—is clear from even a synopsis of the proceedings. Although the State originally moved for a declaration of unitary status in October 1991, the district court *never* even scheduled a hearing on that motion. Faced with this inaction, the State filed a second motion (this time for a declaration of partial unitary status) on May 7, 1992, followed by a third in November 1993. Respondents have consistently opposed even setting a hearing date for the motions.[11] To this day, these motions remain pending.

Consequently, it was not until March 1996, fully *16 months* after the November 1994 trial date requested by the State, that the court finally conducted the required evidentiary hearing.[12] Almost two years after the submis-

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barrage of motions for protective orders. When court-ordered negotiations failed to resolve the dispute, the State moved to compel answers to the interrogatories (G(352)92). Although the district court ultimately ordered respondents to file answers (G(368)92), responses were not actually filed until July 1992, nine months (and $52 million) after the interrogatories were propounded.

[11] *See, e.g.*, G(1379)94 (pleading by NAACP respondents arguing that "the Court should not set a hearing and discovery schedule"); G(1468)95 (noting City Board claim that no hearing should be scheduled until the State files a long-term financing plan to fund the interdistrict busing plan upon restoration of local control).

[12] Respondents' assertions that the delay in scheduling the hearing resulted from the State's "conce[ssion] that it was not able to prove the allegations in its [third] motion" (Bd. Opp. 11; *see also* NAACP Opp. 7) are simply false. Far from conceding any such thing, the State reasonably requested that the court first establish an orderly process of discovery, with a specified cut-off date, to prevent respondents from indefinitely delaying the hearing by lodging frivolous objections, as they did in response to the State's 1991 motion. Respondents also fail to note that they again moved to suspend all proceedings once this Court granted certiorari in *Jenkins III*—a position that, given their assertions here that the facts in St. Louis "differ significantly from Kansas City[, which *Jenkins III* addressed]" (Bd. Opp. 12; U.S. Opp. 7), could only have been taken for the improper purpose of delay.

sion of proofs on the unitary status issue, the court has yet to rule on that issue and, in fact, on April 23, 1996, disclaimed any intention to rule (or even allow briefing) on the issue for the foreseeable future (G(2062)96).[13]

Equally disingenuous are respondents' claims concerning the proceedings before the Settlement Coordinator. The NAACP respondents purport to challenge petitioners' assertion that he has "initiated but a handful of meetings over 19 months" (Pet. 10), but ultimately admit that "only a limited number of large group meetings involving all the parties' counsel have been convened" (Opp. 11).[14] Although respondents hide behind the veil of a confidentiality order, the undisputed fact is that the last meeting of all the parties before the Settlement Coordinator occurred almost one year ago, on March 10, 1997, and that there are *no* settlement offers being discussed by the parties, and *no* additional meetings are scheduled. If that is not an "impasse," the concept has lost all meaning. Finally, the NAACP respondents and the City Board at-

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[13] The NAACP respondents take issue with the educational figures cited in the Petition, offering instead highly misleading figures based on unverified data not of record (Opp. 9 & n.4). The State's data are the official, verified figures, which were received into evidence at the unitary status hearing without challenge or counterproof by respondents. The attack by the NAACP respondents on the undisputed fact, admitted to under oath by St. Louis' own school board president and school superintendent, that City schools are free from discriminatory policies or practices, is misguided. That is why they rely on unidentified "vestiges of the *de jure* system" that existed prior to 1954 (Opp. 10) rather than present-day discrimination in a system that is majority-black and in a school district that has "achieved a high degree of integration" (Pet. App. 20a).

[14] It may be, as the NAACP respondents suggest (and as respondents' fee-petitions in the court below confirmed), that the Settlement Coordinator has conducted other *ex parte* meetings, to which counsel for the State were not invited. That, however, only reinforces petitioners' claim that he has abandoned any pretense of impartiality and assumed the role of an advocate committed to preserving state-funded busing in St. Louis over the State's objection.

tempt to explain away their prior statements refusing to accept anything short of total capitulation by the State (NAACP Opp. 14; Bd. Opp. 5 n.2); however, their own words, pointed to or quoted by petitioners (Pet. 10, 28-29), belie their revisionist claims here.

In the end, of course, the salient facts for purposes of the *Jenkins III* issue are both undisputed and indisputable: (1) the *sole* basis for the issuance and affirmance of the interdistrict funding orders by the courts below is an intradistrict violation at the elementary and secondary levels within St. Louis; and (2) "the existence of an interdistrict violation ha[s] never been litigated in St. Louis" due to a settlement among respondents that was imposed on the State over its objection (NAACP Opp. 16). In light of these facts, petitioners are plainly entitled to the relief they seek under *Jenkins III*. Only this Court's intervention can ensure that *Jenkins III* does not become a dead letter, and that the Eighth Circuit's "perpetual interdistrict remedy machine" (Pet. 29) does not steamroll over the rights of Missouri citizens well into the next millennium.

* * * *

The petition for writ of certiorari should be granted, and the decision below reversed (either summarily or after plenary review).

Respectfully submitted,

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